No.

Brief of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

No.

THE FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY,

Plaintiff in Error,

vs.

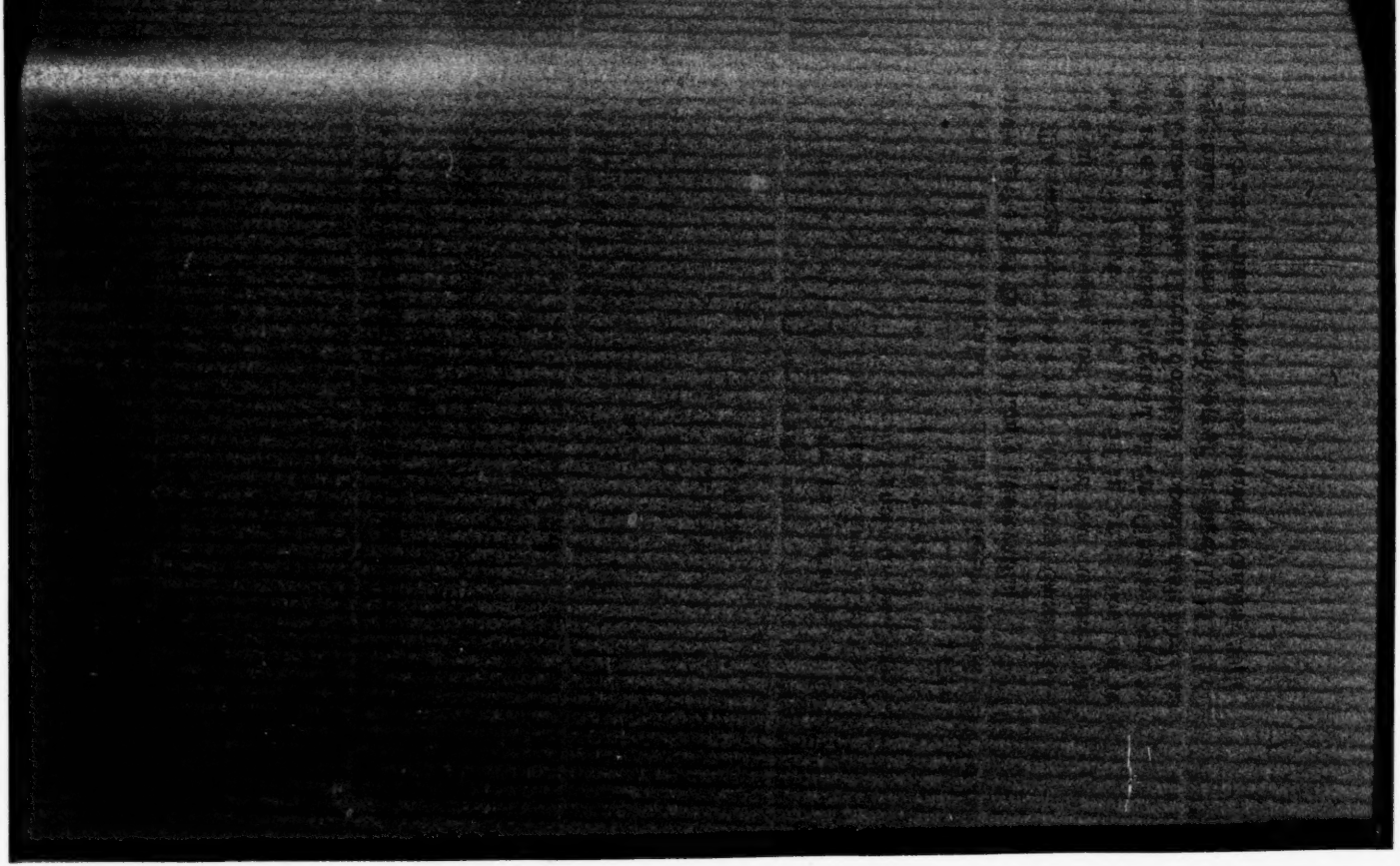
WILLIAM J. BELL, JOHN M. BELL, FRANK A. BELL, et al.,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

On motion of Defendants in Error to dismiss writ of error and to affirm the judgment.

J. A. HENDERSON,
J. C. COOPER,
Attorneys for Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

The Florida Central and Peninsular Railroad Company, Plaintiff in Error. vs. William J. Bell, et al., Defendants in Error.	No. 332.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND AFFIRM THE JUDGMENT.

Statement.

This was an action brought by the plaintiffs, William J. Bell, et al., in the United States Circuit Court for the Southern District of Florida to recover the possession of certain lands described as part of the right of way of the said Florida Central and Peninsular Railroad Company in Tampa, Florida, such lands being formerly known as the Fort Brooke Military Reservation.

The cause was tried by the said Circuit Court without a jury, by consent, and judgment was rendered for the plaintiff below. The plaintiff in error sued out a writ of error from the judgment of the Circuit Court to the United States Circuit Court of Appeals, and filed its assignment of errors, which appear on pages 16 to 18 inclusive of the printed record, and thereafter on May 29th,

1898, the judgment of the said Circuit Court was affirmed by the United States Circuit Court of Appeals. (See pages 174 to 181 inclusive.) From this judgment of the United States Circuit Court of Appeals, the plaintiff in error, The Florida Central and Peninsular Railroad Company has prosecuted its writ of error and filed its assignment of errors. (Pages 182 to 184, inclusive of the printed record.)

The plaintiffs below sought in their declaration to state a cause of action which they claimed arose under certain Acts of Congress, or which required a construction of the Acts of Congress

The plaintiffs alleged in their declaration (found on pages 3 and 4 of the Record) that they claimed title to the land under a patent from the United States upon a pre-emption claim, and that the defendant claimed that the plaintiff derived no title to the land under the laws of the United States, and claimed that under, and by virtue of, the first section of the Act of Congress entitled "An Act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of railroads in said States," approved May 13, 1856, it was entitled to locate its route and locate its road over these lands, to-wit, what was a part of a United States military reservation known as Fort Brooke Military Reservation, at Tampa, Florida, and the plaintiffs also claimed the right to acquire the lands under an Act of Congress approved July 5th, 1885, entitled "An Act to provide for the disposal of abandoned and useless military reservations."

The defendant filed a plea of not guilty to the declaration, and subsequently offered to file four additional pleas (found on pages 7 to 9 inclusive of the printed record.)

The first of said pleas, numbered 2, denied that the Court had any jurisdiction, and denied the facts stated in the declaration which attempted to show that the suit involved questions requiring the construction of the laws of the United States. It denied that the defendant claimed title under any law of the United States. There was no denial by defendant below that it claimed any title or right of possession of the property, but only that it did not at the *time of commencement* of this suit and ever since claim title *under any law of the United States.*

The second of said pleas, numbered 3, alleged that one of the plaintiffs, Matilda P. Feihe, was an insane person, and could not maintain the said suit.

The third of said pleas, numbered 4, set up the manner in which the defendant had taken possession of said right of way, and set up that it had commenced and was then carrying on condemnation proceedings in the Circuit Court for the Sixth Judicial Circuit in and for the county of Hillsborough, State of Florida, to acquire title to said lands.

The fourth of said pleas, numbered 5, set up the pendency of a cause in equity brought by the plaintiffs, as complainants therein, on the 21st of January, 1890, against the defendant to enjoin defendent from constructing and operating its railroad across said lands, and that an order was issued thereon by the Circuit Judge allowing the defendant to proceed on giving a bond in the sum of five thousand dollars, conditioned that on filing said bond the injunction be dissolved, or on defendant's acquiring title under condemnation proceedings under the laws of Florida, that the injunction be dissolved; and that thereafter, on the 22d day of December, 1896, the same plaintiffs had filed a supplemental bill in the said

equity suit setting up said former proceedings, and that they had acquired patent from the United States and seeking to enjoin defendant from using or occupying the lands and for compensation for the value of the land, and for the use and occupation of the same, and that on February 1st, 1897, defendant had filed its answer to said supplemental bill, setting up its defenses, and setting up condemnation proceedings then pending in the Circuit Court for Hillsborough county, Florida, for the purpose of condemning said property under the laws of Florida.

The defendant made a motion to continue the trial of said cause, and on the affidavit stating the facts as to how the property was originally acquired and the use of the right of away by defendant for right of way and the pendency of proceedings to condemn said right of way. (See pages 10 to 12, inclusive, of printed record.)

The defendant also moved the said court to dismiss the said suit, on the ground that the Court had no jurisdiction, as shown upon the face of the declaration in said cause. (See page 12 of the record.)

All of said applications of defendant, to-wit, to file additional pleas, for a continuance, and for a dismissal of the cause were overruled by the Court below, to which exception was duly taken.

The chancery files in said suit of plaintiffs against defendant (found on page 113 to 133 of the printed record) were offered to be filed in evidence by the defendant below, but the Court refused to permit the filing of the same.

The condemnation proceedings in the State Court (found on page 133 to 156 of record) were offered and filed in evidence by the defendant. The Court on the evidence adduced, which is contained in the bill of ex-

ceptions, found for the plaintiff, and judgment was rendered thereon (See pages 14 to 16 of the printed record).

The bill of exceptions sets out the testimony in the case and the rulings thereon (pages 22 to 171 inclusive of the printed record).

A mere reading of the assignments of error will show that there are questions to be determined by the Court on the full hearing of the entire case, and which cannot be disposed of on motion to dismiss the writ of error or to affirm the judgment in advance.

Effect of motion practically an effort to make final hearing before setting of case.

This motion is an effort to have the whole cause heard and determined on a mere motion, in advance of the hearing on the merits. The Court will perceive at once, upon an examination of the motion and a reference to the assignments of error that it will be impossible for this Court to determine whether the assignments of error are predicated on exceptions properly taken or for delay, or whether or not the objection to jurisdiction is frivilous, without an examination of the whole record.

The Appellate Court will not entertain a motion to dismiss a writ of error, or to affirm a judgment as being taken for delay where it is apparent upon the reading of the motion that it requires an examination of the merits of the case and of the questions involved in the case in order to decide the motion.

Hill vs. Chicago & E. R. Co., 129 U. S., 170.

City of New Orleans vs. New Orleans & c., Co., 108 U. S. 15.

Bohanan vs. State, 108 U. S. 231.

Lynch vs. De Barnal 131 U. S., Appendix XCIV.

Grounds of Motion.

The grounds of the motion, in substance, are as follows:

1st. Writ of error does not lie in this case.

2nd. The United States Circuit Court for the Southern District of Florida had jurisdiction of the cause.

3rd. That no one of the assignments of error is well taken.

We insist that on this preliminary motion to dismiss writ, or to affirm the judgment before the regular hearing this Honorable Court will only consider the first ground of the motion, as to whether or not the writ of error would lie in this case. The other grounds of the motion, following, as they do, an examination of the record and of the merits of the case, could only be properly considered at the hearing.

A writ of error lies in this case to review the judgment of the United States Circuit Court of Appeals.

The sixth section of the Act of Congress of March 3, 1891, provides that the judgment and decree of the Circuit Court of Appeals shall be final in certain cases, naming them, and further provides for said Circuit Court of Appeals certifying questions to the Supreme Court of the United States for its determination, and also for the Su-

preme Court, by certiorari, or otherwise reviewing decrees of the Circuit Court of Appeals. The said section 6 also provides as follows: "In all cases not hereinbefore in this Act made final, there shall be the right of appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1000, besides costs."

This is a case that was originally brought in the United States Circuit Court for the Southern District of Florida, not on the ground of citizenship, but on the ground of the alleged existence of a Federal question. It was, therefore, a case not made final within the meaning of said section 6 of the act of March 3, 1891; that is the judgment of the United States Circut Court of Appeals is not made final, but is reviewable in the United States Supreme Court.

It has been determined by this Court a number of times that where a case arises under the laws of the United States and on that ground jurisdiction is assumed by the Court below, that writ of error will lie from the United States Supreme Court to the United States Circuit Court of Appeals to review a judgment of the latter court. This Court entertained an exactly similar writ of error to the U. S. Circuit Court of Appeals for the Eighth Circuit in Northern Pacific R. Co., vs. Smith, decided May 3rd 1898 U. S. Sup. Ct. Rep. Vol. 18, No. 29 page 794.

In a case involving the question of jurisdiction, with other questions, the defeated party may prosecute a writ of error to the United States Circuit Court of Appeals and there contest all of the questions in the case, or such party may prosecute a writ of error directly to the United States Supreme Court to review the question of jurisdic-

tion alone, and on such writ of error the U. S. Supreme Court will review all the questions involved.

Scott vs. Donald, 165 U. S., 73.

Chappell vs. U. S., 160 U. S., 499.

Carey vs. Houston, etc., Ry Co., 150 U. S., 181.

Horner vs. U. S., 143 U. S., 470.

But in the class of cases to which the one at bar belongs predicated upon the existence of Federal questions, and not upon citizenship, the said section 6 of the act of March 3d, 1891, gives the plaintiff in error as matter of right a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals.

The attorney for the defendant in error, on this motion to dismiss the writ of error, does not cite any authority to sustain the proposition that because the defendant below took the whole case on the question of jurisdiction and the merits to the Circuit Court of Appeals, that thereby the judgment of the Circuit Court of Appeals became final, and there is no decision of this Court supporting that proposition in a case like the one at bar.

Northern Pacific R. R. Co. vs Amato, 144 U. S., 465.

Second Ground of Motion.

The second ground of the motion is in effect that the United States Circuit Court for the Southern District of Florida had jurisdiction of the cause. The plaintiff in error insists that the said court did not have jurisdiction of said case, and this question was raised at every stage of the proceedings by the plaintiff in error as defendant in the court below, to-wit, in its pleas and motion to dismiss.

These questions are covered by the first, second and fourth assignments of error.

"A"

These assignments of error involve the jurisdiction of the court below to try this cause—the question of jurisdiction is one of the questions involved in the case, being one of several questions, and is properly assigned as error in this court.

The declaration in this cause undertakes to make a cause of jurisdiction by alleging that the plaintiffs claim title under a patent of the United States, and that the Florida Central & Peninsular Railroad Company claimed title under an act of Congress approved May 17th, 1856, granting public lands in alternate sections in the States of Florida and Alabama, to aid in the construction of certain railroads in said States.

The pleas offered by the defendant show that the defendant did not claim title as alleged in the declaration. This divested the only ground of jurisdiction, to-wit, that both plaintiff and defendant claimed to take title under the laws of the United States. These questions should be determined on the final hearing. The defendants pleas deny the only ground of jurisdiction, and this defeats the jurisdiction.

Robinson vs. Anderson, 121 U. S., 522.

The fact that the plaintiffs claim title by virtue of a patent from the United States does not raise a Federal question and does not confer jurisdiction.

Gold Wash & Water Co. vs Keyes, 96 U. S., 199.

Provident Svgs. Society vs. Ford, 114 U. S., 634, 642

Trafton vs. Nougues, 24 Fed. Cas., 123.

Theurkaf vs. Ireland, 27 Fed Rep., 769.

Murrary vs. Bluebird Mining Co., 45 Fed. Rep., 386.

See, also, 47 Fed. Rep., 340, and 49 Fed. Rep., 289.

Starin vs. N. Y., 115 U. S., 248-257.

But a statement by plaintiffs of defendant's claim of title does not make a case of Federal jurisdiction.

Tenn. Bank vs. Union and Planters' Bank, 152 U. S., 454.

Chappell vs. Waterworth, 155 U. S., 102.

East Lake Land Co. vs. Brown, 155 U. S., 488.

Oregon Short Line vs. Skottowe, 162 U. S., 490.

Fla. vs. Charlotte Harbor Phos. Co. (C. C. A., 5th Cir.) 74 Fed. Rep., 578.

Wabash R. R., vs. Barbour (C. C. A., 6th Cir.) 73 Fed. Rep., 513.

The defendants moved to dismiss the case for lack of jurisdiction upon the face of the declaration. (See page 20 of the Record) which motion was denied. The motion and the ruling thereon presents a question for the decision of this court without any exception separately reserved thereto, and if a special exception was necessary the same was properly taken, as will appear upon page 296 of the Record.

The Supreme Court of the United States held in Metcalf vs. Watertown, 128 U. S., 586, and in Col., Centl. Mining Co. vs. Turk, 150 U. S., 138, and cases there cited, that unless a question of the jurisdiction is made on the face of the declaration, it should be dismissed on motion. This question is duly raised by the motion in this cause.

Third Ground of Motion.

The third ground of the motion, to-wit: that no one of the assignments of error is well taken, would require an examination of each of said assignments, which we do not think this Court should be called upon to do, on a motion to dismiss or to affirm the judgment, but if the Court investigates the record to determine whether said judgment should be affirmed, we insist that the first, second and fourth assignments of error as to the jurisdiction stated above were correctly made and should have been sustained, and in addition we call the Court's attention briefly to certain other of the assignments of error, on which we insist that the ruling of the court below, and of the United States Circuit Court of Appeals was erroneous.

Third Assignment of Error.

The third assignment of error was to the refusal of the Court to entertain defendant's pleas 3, 4 and 5.

The third plea in effect stated that one of the plaintiffs, Matilda P. Feihe, was a person non compos mentis, insane, and not entitled to maintain the suit.

The statutes of Florida distinctly provide that suits by insane persons must be brought by their guardians. Section 982 Revised Statutes of the State of Florida, reads as follows: "INFANTS, LUNATICS, ETC. An infant may sue by his next friend in all cases whatsoever, and idiots and lunatics by their guardians."

It has been held in many cases that an insane person should sue by a committee or guardian.

Bird vs. Bird, 21 Grattan (Va.) 712.

Chicago &c. R. Co. vs. Munger, 78 Ill., 300.

Dearman vs. Dearman, 5 Ala., 202.

Warden vs. Fichbaum, 14 Pa. St., 121.

Hays vs. Miller, 81 Mo., 424.

Whetstone vs. Whetstone, 75 Ala., 495.

The pleas numbered 4 and 5, (page 8 of record), in effect state that the plaintiff in error, defendant below, constructed its road upon this property by leave of the United States Circuit Court, under an order dated January 2, 1890, in a chancery suit brought by the same parties as complainants who were plaintiffs in the suit above, against the defendant railroad company, which order of the Circuit Court authorized the giving of bond by the defendant company, and also provided that the injunction granted in the case be dissolved on the defendant company acquiring title to condemnation proceedings.

Plea number 4 set up the condemnation proceedings, and plea numbered 5 showed that the defendant railroad company went on the land and in possession of it under such circumstances as not to be a trespasser, and brought the case within the rule that ejectment would not lie against this defendant railroad company to oust it of the possession of the property, but that plaintiffs' cause of action was a suit for the value of the land taken.

This Court has determined that wherever possession of a right of way is acquired by a railroad company and its track constructed upon the land under circumstances which render it inequitable for the owner of the land to maintain ejectment, that said owner could not maintain an action of ejectment, but must sue for the value of the land.

See Roberts vs. No. Pac. R. R. Co., 158 U. S., 1.

No. Pac. R. R. Co. vs. Smith, decided May 31, 1898.

Supreme Court Rep. Vol. 1 18, No. 29, page 794.

This last case, in its facts, is very similar to the case at bar. The defendant railroad company in the case at bar before the Land Department of the United States claimed a right of way over this land, but this claim was denied by the United States Land Department and a patent issued to the plaintiffs below. In 1890, at the time the defendant railroad company constructed its road across the land in question, the United States Land Department had not yet determined whether the plaintiffs below were entitled to a patent, or whether the defendant railroad company had a right of way over the land. The defendant, under these circumstances and pending the chancery suit above mentioned with the defendant railroad company, built and constructed its road across the land in question, after giving the bond required by the United States Circuit Court for the Southern District of Florida to protect the plaintiffs' rights. It is, therefore, a case in which judgment in ejectment should not be permitted to stand.

Fifth Assignment of Error.

The fifth assignment of error was a motion for continuance of the case, on the ground that the Florida Central and Peninsular Railroad Company was engaged in pursuing condemnation proceedings in the State Court, to acquire title to the land, and had built its road on the land in good faith, and that the said Florida Central and Peninsular Railroad Company went into possession on order of his Honor Don A. Pardee, on giv-

ing a bond of $5,000 subject to condemnation proceedings.

We submit that this presented sufficient ground for a continuance of the cause, so that no judgment should be entered pending such condemnation proceedings.

It has been held in Florida that judgment in ejectment would be suspended pending condemnation proceedings.

See Patterson, etc., R. R. vs. Kamlah, 42 N. J. Eq. 93, 28 A. & E. R. R. Cas. 250.

Lewis Em. Dom,, sec. 634.

Pittsburg R. R. vs. Bruce, 102 Pa. St. 23, 10. A. & E. R. R. Cas. 1.

Conger vs. R. R., 41 Iowa, 419.

The Florida Central & Peninsular Railroad Company went into possession of this property in good faith and built upon the property long before any patent issued to plaintiffs and was duly seeking to condemn the land. This presents a question which should be examined in the cause. It is true that on the 5th of March, 1897, the amended petition for condemnation was dismissed by the State Court, but it was without prejudice to the filing of a new petition by petitioner and an affidavit for continuance. Motion for continuance was made on February 18th, 1897, and denied on that date, pending condemnation proceedings. (See page 10 of the record.) So that the record did in fact show that the company was proceeding to condemn and was entitled to file amended condemnation proceedings under the order of the State Court and that a cause of condemnation was pending.

Sixth Assignment of Error.

The sixth assignment of error was the refusal of the Court below at the trial to permit the introduction of any evidence of the chancery record in the case pending between the same parties, bill filed in December, 1889, which record showed that the defendant Florida Central & Peninsular Railroad Company entered into possession of said land at the time under the order in the chancery suit, that upon giving of a bond for $5,000, the injunction would be dissolved, granted in the said suit. The defendant was entitled to introduce this record to show the pendency of an equity suit involving the same subject matter and to show how the defendant came into possession of the property. These are questions to be argued on the final hearing, but exception was duly taken to the action of the Court refusing permission to file this record ; as shown by the bill of exceptions see page 113 of the record.

The Court undoubtedly should have permitted the introduction of this chancery record in evidence, to show the facts under which the defendant railroad company went into possession of the property. These facts amounted to an adjudication under the order of the United States Circuit Court of Appeals, and acquiesence therein by the plaintiffs below, that on the giving of the bond of $5,000, and the bringing of condemnation proceedings that the defendant railroad company might build its railway across the land in question.

Under the decisions of this Court ejectment will not lie to oust a railroad company in possession of part of its right of way on which a railroad is constructed and being operated, because the public as well as the parties have an interest in the continued operating of such railroad.

Roberts vs. No. Pac. R. R. Co., 158 U. S. 1.

No. Pac. R. R. Co. vs. Smith, decided May 31, 1898, Supreme Ct. Rep. Vol. 18, No. 29, page 794.

Seventh Assignment of Error.

The seventh assignment of error goes to the very merits of the title as between the plaintiff and defendant.

The court below refuses to dismiss for want of jurisdiction or to entertain defendant's plea that it did not claim under a law of the United States.

The plaintiff put in evidence the claim of title of both plaintiff and defendant made before the Interior Department, found on pages 23 to 50 of the record. Before the Interior Department the plaintiff claimed the right to pre-empt the land, although it had been part of a military reservation, and defendant before the Interior Department claimed a right of way across the land under an act of Congress.

If the court below entertained jurisdiction of this case and were justified in so doing, the plaintiff in error here has a right to have it determined in the appellate court whether or not the action of the Interior Department as a matter of law was correct in holding and determining that defendant was not entitled to a right of way accross this land under act of Congress of 1856. In other words, the question of plaintiffs' and defendants' title, the defendant has a right to have determined in this court, and to review the finding of the court below on this subject.

Eighth and Ninth Assignments of Error.

The court below found as a matter of fact that the plaintiffs were entitled to recover mesne profits and damages from the defendant Florida Central and Peninsular Railroad Company prior to the issue of any patent by the United States to plaintiffs.

This is a question raised by the assignment of errors and appearing on the face of the findings made by the court below and cannot be disposed of on mere motion to dismiss the writ of error.

Tenth Assignment of Error.

The tenth assignment is as to the finding of the amount of rents and profits in favor of the plaintiff on the evidence as shown by the bill of exceptions. This requires an examination of the record in the cause, but should not be disposed of on this motion.

Eleventh and Twelfth Assignments of Error.

The eleventh and twelfth assignments of error are in effect that the court found a judgment in favor of plaintiff to recover an entirely different piece of land from that described in the declaration and further that the court could not make any finding or judgment for recovery on the description in the declaration, the same was too vague and indefinite upon which to base any judgment or finding. A comparison of the land described in the judgment of the court with the declaration will show that the court attempted to work out its own de-

scription of a different piece of land from that described in the declaration. An examination of the land described in the declaration will show no sufficient metes or bounds or measurements are given to describe the land sued for. No judgment or right of possession thereon could properly be executed on the land described in said declaration.

In Florida the judgment in an action of ejectment must describe exactly the property recovered and must find a right of possession in the plaintiff of that particular land and must state the quantity of the estate of the plaintiff in the particular piece of land described in the verdict and judgment.

Horne vs. Carters, Admr. 20, Fla. 51.

Ashmead vs. Wilson 22, Fla. 255.

Sedgwick & Wait on trial of title, etc.

Sec. 457, 458, 459, 463.

Section 1515 of the Revised Statutes of the State of Florida is as follows: "A verdict for the plaintiff shall state the quantity of the estate of the plaintiff and describe the land *by its metes and bounds*, by the number of the lot or other certain description." The judgment awarding possession shall in like manner state the quantity of the estate, and give a description of the land recovered."

In order to carry out and enforce this statute the declaration must state a sufficient description and the finding must follow the land described in the declaration.

See Asa vs. Hiser, 27 Fla. 378.

Patrick vs. Young, 18 Fla., 50.

Lungren vs. Brownlie, 20 Fla., 491.

Neal vs. Spooner, 20 Fla., 38.

Slacum vs. Pomery, 6 Cranch, 221.

The motion to dismiss the writ of error in this case certainly ought not to be granted where it appears that there are questions to be decided and determined by this court in the hearing of the cause and the motion to affirm is equally objectionable.

It does not appear that this writ of error was taken for delay and the objections as to jurisdiction are not frivilous. From the matters above set forth, it will appear that there are several important questions to be determined by this court on this writ of error. It is not necessary to repeat what is said above.

This motion to affirm is only an effort to have the cause heard and disposed of on motion, which motion requires an argument of the whole case and an investigation of the whole case. Such investigation will not be made before the cause is set down for hearing in its regular order.

The questions raised on the propriety of the action of the court below in disallowing the additional defences offered by defendant under pleas 2, 3, 4 and 5, in refusing to dismiss the cause for want of jurisdiction in awarding the damages and judgment it did award, and in refusing of permit the filing of the chancery record as evidence in the cause, are all properly before this court on this writ of error and do not show a writ of error taken for delay, or the raising of frivilous matter.

We submit that this court will not dismiss a writ of error where there appears to be any question raised by

the assignment of errors worthy of consideration by the court. A mere reading of the assignment of errors, page 16 of the record, will show that there are such questions here raised.

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J. C. Cooper
Attorneys for Plaintiff in Error.

In the Brief of Cooper for

Filed April 5, 1879

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1878.

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BRIEF OF PLAINTIFF IN ERROR.

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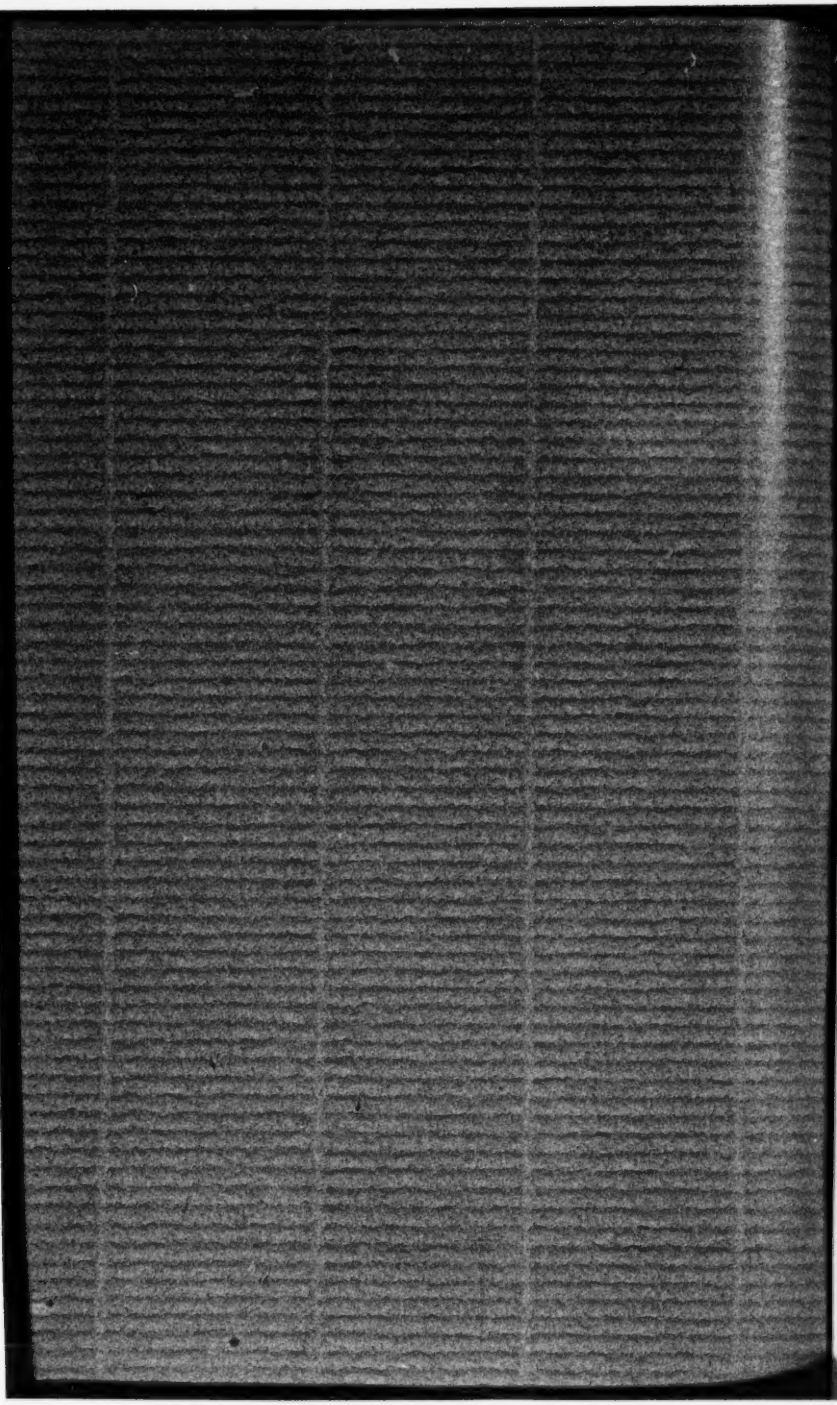
Attorneys for Plaintiff in Error.



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BRIEF OF PLAINTIFF IN ERROR.

Statement.

This was an action brought by the plaintiffs, William J. Bell, et al., in the United States Circuit Court for the Southern District of Florida to recover the possession of certain lands described as part of the right of way of the said Florida Central and Peninsular Railroad Company in Tampa, Florida, such lands being formerly known as part of the Fort Brooke Military Reservation.

The cause was tried by the said Circuit Court without a jury, by consent, and judgment was rendered for the plaintiffs below. The plaintiff in error sued out a writ of error from the judgment of the Circuit Court to the United States Circuit Court of Appeals, and filed its assignment of errors, which appear on pages 16 to 18 inclusive of the printed record, and thereafter on May 29th, 1898, the judgment of the said Circuit Court was affirmed by the United States Circuit Court of Appeals. (See pages 174 to 181 inclusive.) From this judgment of the United States Circuit Court of Appeals, the plaintiff in

error, The Florida Central and Peninsular Railroad Company has prosecuted its writ of error and filed its assignment of errors. (Pages 182 to 184, inclusive, of the printed record.)

The plaintiffs below sought in their declaration to state a cause of action which they claimed arose under certain Acts of Congress, or which required a construction of Acts of Congress.

The plaintiffs alleged in their declaration (found on pages 3 and 4 of the record) that they claimed title to the land under a patent from the United States upon a pre-emption claim, and that the defendant claimed that the plaintiffs derived no title to the land under the laws of the United States, and claimed that under, and by virtue of, the first section of the Act of Congress entitled "An Act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of railroads in said States," approved May 13, 1856, it was entitled to locate its route and locate its road over these lands, to-wit, what was a part of a United States military reservation known as Fort Brooke Military Reservation, at Tampa, Florida, and the plaintiffs also claimed the right to acquire the lands under an Act of Congress approved July 5th, 1885, entitled "An Act to provide for the disposal of abandoned and useless military reservations."

The defendant filed a plea of not guilty to the declaration, and subsequently offered to file four additional pleas (found on pages 7 to 9 inclusive, of the printed record.

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claimed title under any law of the United States. There was no denial by defendant below that it claimed any title or right of possession of the property, but only that it did not at the *time of commencement* of this suit and ever since claim title *under any law of the United States.*

The second of said pleas, numbered 3, alleged that one of the plaintiffs, Matilda P. Feihe, was an insane person, and could not maintain the said suit.

The third of said pleas, numbered 4, set up the manner in which the defendant had taken possession of said right of way, and set up that it had commenced and was then carrying on condemnation proceedings in the Circuit Court for the Sixth Judicial Circuit in and for the county of Hillsborough, State of Florida, to acquire title to said lands.

The fourth of said pleas, numbered 5, set up the pendency of a cause in equity brought by the plaintiffs, as complainants therein, on the 21st of January, 1890, against the defendant to enjoin defendant from constructing and operating its railroad across said lands, and that an order was issued thereon by the Circuit Judge allowing the defendant to proceed on giving a bond in the sum of five thousand dollars, conditioned that on filing said bond the injunction be dissolved, or on defendant's acquiring title under condemnation proceedings under the laws of Florida, that the injunction be dissolved; and that thereafter, on the 22d day of December, 1896, the same plaintiffs had filed a supplemental bill in the said equity suit setting up said former proceedings, and that they had acquired patent from the United States and seeking to enjoin defendant from using or occupying the lands and for compensation for the value of the land, and for the use and occupation of the same, and that on February 1st, 1897, defendant had filed its answer to said

supplemental bill, setting up its defenses, and setting up condemnation proceedings then pending in the Circuit Court for Hillsborough county, Florida, for the purpose of condemning said property under the laws of Florida.

The defendant made a motion to continue the trial of said cause, and on the affidavit stating the facts as to how the property was originally acquired and the use of the right of way by defendant for right of way and the pendency of proceedings to condemn said right of way. See pages 10 to 12, inclusive, of printed record.)

The defendant also moved the said Court to dismiss the said suit, on the ground that the Court had no jurisdiction, as shown upon the face of the declaration in said cause. (See page 12 of the record.)

All of said applications of defendant, to wit, to file additional pleas, for a continuance, and for a dismissal of the cause were overruled by the Court below, to which exception was duly taken.

The chancery files in said suit of plaintiffs' against defendant (found on pages 113 to 133 of the printed record) were offered to be filed in evidence by the defendant below, but the Court refused to permit the filing of the same.

The condemnation proceedings in the State Court (found on pages 133 to 156 of the record) were offered and filed in evidence by the defendant. The Court on the evidence adduced, which is contained in the bill of exceptions, found for the plaintiffs, and judgment was rendered thereon (See pages 14 to 16 of the printed record.)

The bill of exceptions sets out the testimony in the case and the rulings thereon (pages 22 to 171 inclusive of the printed record.)

The property for which said suit is brought, and the taking of the possession of same by plaintiff in error, are referred to and described in the declaration of defendants in error, as plaintiffs in the Court below, as follows: "Because the defendant, heretofore to-wit, in the year A. D., one thousand, eight hundred and ninety, took possession of, as its railroad bed and right of way, and built its railroad of four tracks across and through and upon a strip and parcel of land, being a part of lot eight, section twenty-four, township twenty-nine, south of range eighteen, east according to the surveys, maps and plats thereof made by the Government of the United States, and under and according to the laws of the said United States, which said lot eight is in Hillsborough County, State of Florida, and in the said Southern district of Florida, which said strip and parcel of land so taken as aforesaid by the defendant, and which the said defendant is in possession of and was in possession of at the time of the commencement of this suit, contains about seven acres, etc." See page 3 of printed record.

The Court made its findings of law and fact, and rendered a judgment in favor of plaintiffs and against defendant, to-wit, that plaintiffs recover from the defendant the sum of nineteen hundred and fifty-four dollars, and also the following as to the lands mentioned in said judgment, "It is further considered that the said plaintiffs have a fee simple title in and to the lands and premises described, as follows, to-wit: A strip and parcel of land lying and being a part of lot eight (8), section twenty-four (24), township twenty-nine (29), south of range eighteen (18) east of the meridian of Tallahassee, in the County of Hillsborough, State of Florida, beginning at a point in the east boundary line of said lot eight (8), at a distance of seventy-five (75)

feet, in a south direction from the northeast corner of said lot, and running southeasterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot eight (8), fourteen hundred and twenty-four (1424) feet, thence south on said western boundary line seventy-five (75) feet, thence northeasterly, on a line parallel to the said northwestern boundary line of said lot to the eastern boundary of said lot; thence north along said eastern bonndary line seventy-five (75) feet to the place of beginning." See pages 14 to 16 of the record. From this judgment, the defendant below sued out its writ of error to the Circuit Court of Appeals, and from the judgment of said Circuit Court of Appeals to this Court.

ARGUMENT.

The Court below had no jurisdiction.

These questions are covered by the first, second and fourth assignments of error.

These assignments of error involve the jurisdiction of the court below to try this cause—the question of jurisdiction is one of the questions involved in the case, being one of several questions, and is properly assigned as error in this court.

The declaration in this cause undertakes to make a cause of jurisdiction by alleging that the plaintiffs claim title under a patent of the United States, and that the Florida Central & Peninsular Railroad Company claimed title under an act of Congress approved May 17, 1856, granting public lands in alternate sections in the States of

Florida and Alabama, to aid in the construction of certain railroads in said States.

The pleas offered by the defendant show that the defendant did not claim title as alleged in the declaration. This divested the only ground of jurisdiction, to-wit, that both plaintiff and defendant claimed to take title under the laws of the Unted States. The defendants' pleas deny the only ground of jurisdiction, and this defeats the jurisdiction.

Robinson vs. Anderson, 121 U. S., 522.

The fact that the plaintiffs claim title by virtue of a patent from the United States does not raise a Federal question and does not confer jurisdiction.

Gold Wash & Water Co. vs. Keyes, 96 U. S., 199;

Provident. Svgs. Society vs. Ford, 114 U. S., 634, 642;

Trafton vs. Nougues, 24 Fed. Cas., 123;

Theurkaf vs. Ireland, 27 Fed. Rep., 769;

Murray vs. Bluebird Mining Co., 45 Fed. Rep., 386;

Bluebird Min. Co. vs., Largey et al., 49 Fed. Rep., 289, 291.

Starin vs. N. Y., 115 U. S., 248-257.

But the statement by plaintiffs of defendant's claim of title does not make a case of Federal jurisdiction.

Tenn. Bank vs. Union and Planters' Bank, 152 U. S., 454.

Chappell vs. Waterworth, 155 U. S., 102;

East Lake Land Co. vs. Brown, 155 U. S., 488;

Oregon Short Line vs. Skottowe, 162 U. S., 490;

Fla. vs. Charlotte Harbor Phos. Co. (C. C. A., 5th Cir.), 74 Fed. Rep., 578;

Wabash R. R. vs. Barbour (C. C. A., 6th Cir.), 73 Fed. Rep., 513.

The defendant moved to dismiss the case for lack of jurisdiction upon the face of the declaration. (See page 20 of the Record) which motion was denied. The motion and the ruling thereon presents a question for the decision of this court without any exception separately reserved thereto, and if a special exception was necessary the same was properly taken, as will appear upon page 170 of the Record.

The Supreme Court of the United States held in Metcalf vs. Watertown, 128 U. S., 586, and in Col., Centl. Mining Co. vs. Turk, 150 U. S., 138, and cases there cited, that unless a question of jurisdiction is made on the face of the declaration, it should be dismissed on motion. This question is duly raised by the motion in this cause.

The first, second and fourth assignments of error, and the portion of the third assignment of error covering the refusal of the Court for leave to file the second additional plea found on pages 7 to 8 of the record, may be considered together. These assignments of error present two questions for the determination of this Court.

1st. The Court below had no jurisdiction of the case as stated upon the face of the declaration.

2nd. The additional plea number two above mentioned of the defendants, denied that defendants claimed title under any law of the United States, and therefore the Court below had no jurisdiction of this cause.

The defendants below moved the Court to dismiss this cause for want of jurisdiction before the trial of the case. See page 12 of the printed record. Which motion

is also inclu led in the bill of exceptions, page 170 of the printed record.

Unless the declaration distinctly showed a case of jurisdiction in the Court at the time this suit was brought, the Court below should have granted this motion to dismiss the case for lack of jurisdiction. The declaration found on pages 3 to 5 inclusive of the record, shows that the only ground of jurisdiction attempted to be stated was that the plaintiff claimed title under and by virtue of a patent from the United States. The declaration further alleges that the defendant claimed, insisted and contended in the General Land Office and before the Secretary of Interior, that plaintiffs were not entitled to have a patent, and that at the time of the commencement of this suit claimed and insisted that plaintiff had no title to said land under said patent, and at said time claimed that under an act of Congress entitled "An Act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of railroads in said States, approved May 17th, 1856," it was entitled and had a right to locate the route of its railroad, and construct the same, through the said lands and to be in possession thereof, said section eight being a part of the Fort Brooke Military Reservation at Tampa, State of Florida. The declaration further alleges that the plaintiffs contended for and claimed a patent to said land under an Act of Congress entitled "An Act to provide for the disposition of abandoned and useless military reservations," approved July 5th, 1885, and that defendant in the General Land Office, and in office of the Secretary of Interior claimed and contended, and at the commencement of this suit claimed and contended that plaintiffs were not entitled to a patent to said land under said Act of Congress, and at said times claimed and insisted

that it was entitled to locate its route of its railroad over said parcel of land and to be in possession thereof under and by force of the third proviso of the said Act of Congress approved May 17th, 1856.

These allegations of the declaration do not state a case necessarily involving *the construction* of any act of Congress. The allegations do not declare that plaintiff claimed title under their patent, or obtained it by reason of one *construction* of the law of the United States, and defendants claimed by reason of *another construction* of any law of the United States that said patent did not pass title.

These allegations do not state a case showing that by reason of any construction of the Act of Congress of May 17th, 1856, referred to, defendants had title to said lands, or right of possession thereof. The declaration shows on its face that plaintiffs claimed title to said land under and by virtue of a patent granted by the Government of the United States of America to the said Lewis Bell and his heirs. The question as to whether the plaintiffs derived title to said land under and by virtue of the patent as against the defendant would not in itself be a Federal question. All titles are derived mediately or immediately from the Government, and therefore, the fact that plaintiff claims title under a patent from the Government, which title is resisted by the defendant, does not present a Federal question.

The allegation of the declaration, that at the time of the commencement of the suit defendant claimed, that under said act, approved May 17, 1856, it was entitled to, and had a right to locate the route of its railroad and construct the same through the said lands and to be in possession thereof, on the ground that the said tract of land was a part of a military reservation, does not

necessarily present a Federal question. Under this declaration the plaintiffs might attempt to show, as they did in the Interior Department, that the defendant had not, *in fact*, complied with the terms of the act of May 17th, 1856, and had not, *in fact*, built its road on said reservation, in pursuance of said act, but had located its original route of definite location on a different route from the one now built upon, across this portion of said reservation. Whether or not this were true, would not present a Federal question. This declaration, to state a case authorizing a Federal court to try the case, should state that, in fact, the said defendant went upon the land under said act, and, in fact, did those things required by the act, but that the correct construction of the act gave defendants no right to go upon this land.

It is entirely consistent with this declaration, that the Court would not be called upon to construe the act itself at all, but that plaintiff should simply prove that the defendant had not complied with the act. So, in reference to the act of July 5th, 1885, referred to in the declaration. It is alleged in the declaration that the defendant contended before the Interior Department, and at the time of the commencement of this suit, that plaintiffs were not entitled to a patent under the act, but, it is not alleged that defendant contended that they were not entitled to such patent by reason of any construction of the law, and such contention might as well have been based on the ground that they had not complied with the law. The patent having issued, as stated in the declaration, no allegation in the declaration that the defendant contended that said patent should not have been issued states a case of Federal jurisdiction, unless it is distinctly stated that such claim and contention *is based on matter of law or construction of Federal statutes*, and these allegations

should be in a form that excludes all other constructions that may be put upon the declaration. Under this declaration, the Federal Court could try simply the right of possession of defendants by reason of their, in fact, having complied with the act of May 17th, 1856, and obtained possession under said act, or not, and these would all be matters of fact, requiring no construction of the acts of Congress.

The declaration, in order to state Federal questions, so as to give the Court jurisdiction, should state *in terms* what the *question* is, or was, under the acts of Congress named, and the *construction* of same which would be required to be determined by the Court in deciding whether the plaintiff or defendant had title to the lands. It is not enough to simply state that plaintiff claims title under a patent, and that defendant denies that plaintiff had a right to a patent, and that defendant claims and insists that it has a right to be in possession under some act of Congress. The declaration must go further, and show what *questions*, whether of *construction*, or otherwise, arise on the acts of Congress under which the parties claim title. This case could be, and was, under this declaration an ordinary contention of who had the title or right of possession to the land, and therefore was not a case of Federal jurisdiction. The right claimed by the plaintiff, or by the defendant, as stated in the declaration, do not necessarily involve the construction of the laws of the United States.

The declaration must show the plaintiffs claim of title, requires a construction of an Act of Congress.

The declaration shows that *plaintiff's* claim title under a patent from the United States already granted. The construction of the rights conferred by the United States land patent does not raise a Federal question. It is simply a case of an ordinary right of property sought to be enforced. It must appear, in order to create a Federal question, that *plaintiff's* title, on which recovery depends will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction. The declaration presents no such questions or questions on the record, of construction of the constitution or any law of the United States upon which the *plaintiff's* claim of title depends.

In order to sustain the jurisdiction by reason of the existence of a Federal question, it should appear on the face of this declaration that the rights of the *plaintiff necessarily* hang on the construction of the law of the United States.

The allegations in the declaration in regard to claims or contentions of the defendant to locate the route of its railroad through the said land and to be in possession thereof, under an Act of Congress do not raise a Federal question so as to confer jurisdiction on this Court.

By the case of Tennessee, etc., vs. Union and Planters Bank, 152 U. S., 454, it is settled that a United States Court has no original jurisdiction of a suit as one arising under the laws of treaties of the United States, *unless it appears distinctly by the plaintiff's statement of his own claim.*

In this case the Court adopts the views of Mr. Justice Miller in his dissenting opinion in R. R. vs. Miss., 102 U. S., 135, whe he takes the position that a defense based on Federal laws would not support Federal juris-

diction. In this case of Tennessee vs. Bank, 152 U. S,. 454, the Court says, at page 464, that it is well settled law, " That a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States, does not make the suit one arising under the constitution or those laws. And this is approved in the following cases:

Chappell vs. Waterworth, 155 U. S., 102;

East Lake Land Co. vs. Brown, 155 U. S., 488;

Oregon Short Line vs. Skottowe, 163 U. S., 490;

Fla. vs. Char. Har. Phos. Co. (C. C. A., 5th Cir.), 74 Fed. Rep., 578;

Wabash R. R. vs. Barbour (C. C. A., 6th Cir.), 73 Fed. Rep., 513.

In Metcalf v. Watertown, 128 U. S., 586, 589, it was held: " Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not appear, then the Court upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the State Court a suit which the record at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the *defendant* may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of

the suit, is not cured by an answer or plea which may suggest a question of that kind."

This case is approved in Col. Central Mining Co. vs. Turck, 150 U. S., 138;

See also Central Railroad vs. Mills, 113 U. S., 249, 257. Montana Ore Co. v. B. & M. C. C. & S. Min. Co., 93 Fed. Rep. 274

The fact that the *defendant is* alleged in the declaration to claim rights under an act of Congress, would not avail the plaintiff, then, in order to make the case cognizable in a Federal Court, no matter how distinctly the Federal question involved on *defendant's* contention was pleaded.

No Federal question distinctly stated.

In Hanford vs. Davies, 163 U. S., 273, it is held that where jurisdiction is claimed on the ground that there is a Federal question involved, it is not sufficient that jurisdiction will be inferred argumentatively under averments in the pleadings, but the averments should be positive Where all that appears from the record is that if certain conditions of fact are made to appear in evidence, as in this case, that the defendants complied with the act of May 17th, 1856, and in fact went into possession under it, then a Federal question may arise on the construction of the act in case jurisdiction is made. The exact question of construction must be stated.

Iowa vs. Railway, 33 Fed. Rep., 391;

Manhattan Ry. vs. Mayor of N. Y., 18 Fed. Rep., 195.

For the reasons stated above, the declaration does not state a case of jurisdiction. It plainly alleges *plaintiff's* only claim of title is by authority of the patent, and

shows no construction of any Act of Congress necessary to establish *ptaintiff's* claim. The allegation as to *defendant's* claim of title under an Act of Congress can give no jurisdiction. The allegations are too indefinite and uncertain as to what Federal question or what question of construction, if any, of any law of the United States must necessarily arise in the case, and therefore the declaration states no case of jurisdiction.

Defendant's plea denied any claim under the laws of the United States.

The defendant's plea, number 2 (see pages 3, 4 and 168 of the Record), is a distinct denial that defendant claims title to the lot under any act of Congress or denies plaintiff's title by reason of construction of any act of Congress.

If the Court should find that the declaration has averred the existence of a Federal question in such terms as to presumptively state a case of jurisdiction, that jurisdiction fails upon the filing of defendant's plea admitting the rights claimed by plaintiff under the laws of the United States and denying that the defendant claims any rights under the laws of the United States in land in question. There cannot be a suit arising *under the laws* of the United States, unless the plaintiff claims, and the defendant denies the right of plaintiff existing by virtue of the laws of the United States. If defendant admits all that plaintiff claims under the United States laws and declares no intention of itself relying on those laws, there is no question arising under the laws of the United States for the Court to adjudicate, and this precise point has

been so decided by the Supreme Court of the United States in the case of:

Robinson vs. Anderson, 121 U. S., 522. In this case Chief Justice Waite, says, "Even if the complaint standing by itself, made out of jurisdiction, which we do not decide it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what *the defences* against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on."

To the same point, see S. P. Ry. vs. Whittaker, 47 Fed. Rep., 529.

Stayton Mining Co. vs. Woody, 50 Fed. Rep. 633.

Section 5 of the Judiciary Act 1875 provides that the Court shall dismiss the suit at any time when it appears that the Court has no jurisdiction. If it appears from the *evidence even*, admissible under the pleading, pertinent to the issues, that the Court has no jurisdiction, the Court should dismiss the suit.

Hartzog vs. Memory, 116 U. S., 588, 591.

Considering together the cases above cited, particularly Tennessee vs. Bank, 152 U. S., 454, and Robinson vs. Anderson, 121 U. S., 522. The following is the law as decided by the Federal Courts upon the matter of jurisdiction, based on the existence of a Federal question.

1. In order to confer any jurisdiction on a United States Court, in all suits arising under the laws of the United States, the declaration must distinctly and positively show on its face that the *plaintiff* claims rights, the existence of which *necessarily* hangs on the *construction* of the Constitution, or some law of the United States.

2nd. If the jurisdiction, thus prima facie, appears by the plaintiff's pleadings, it falls if the defendant in his answer or plea admits the rights claimed by the plaintiff under the Constitution or laws of the United States, or if at any stage of the case it appears that the issues do not necessarily involve the construction of such constitution or laws.

The Court erred in refusing to permit the filing of additional plea, number 2,

The Court clearly erred in not permitting the defendant to plead to the jurisdiction, as stated in the said plea. This plea denies the existence of any of the claims or contentions which could by any possibility create Federal questions in this case. The plea states that the defendant admits that patent was issued by the United States to plaintiffs, and admits that plaintiffs claimed title to said land described in the declaration as heirs of Louis Bell under said patent, and the defendant says it is not true that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiff derived title to said land under and by virtue of said patent, and that it is not true that at said time, or at any time since, that defendant claimed under the laws of the United States or act of Congress referred to, (referring to Acts,) or any other act of Congress, or law of the United States, any right or title in the land. Defendant also admits that now and at the time of the commencement of the suit it had no title under any act of Congress or laws of the United States, and asks that the suit be dismissed. Whether the Court admitted this plea to be filed technically as a plea, it was certainly good as an affidavit sworn to, in support of a motion to dismiss for want of jurisdic-

tion, and the Court immediately on the tendering of this paper to be filed, sworn to, should have dismissed this case, because there was nothing further to litigate before the Court—the only questions the Court then could possibly have entertained would be the mere questions of title or no title and of damages, to consider which it had no jurisdiction in the case made.

The Court in its order (page 9 of the record) refusing to permit the filing of the pleas decided, "It appearing that none of said pleas constitute a good defense to said action that could not as well be shown under the general plea of "Not Guilty," it is ordered that said motion to file the additional pleas be denied." This ruling does not meet the question of jurisdiction raised by the plea. Whether the facts of what sources of title the parties claimed under could be investigated under a plea of not guilty, and whether or not the existence of Federal questions could be investigated under the plea of "Not Guilty," was no ground for refusing to file the plea, which on its face, without the taking of evidence, destroyed every possible Federal question in the case, or the possibility of such a question arising because the defendant in and by the plea denied that it disputed the plaintiff's title under the patent and denied that it claimed title or right of possession under any act of Congress. If this plea had been filed, no Federal question could arise in the case, and the Court should have filed the plea and dismissed the suit.

The Court below also erred in holding that a plea to the jurisdiction should not be filed where a plea of not guilty has been filed in the case, for under the Judiciary act of 1875 the defendant may at any time file a plea raising the question of jurisdiction. The plea of "Not Guilty" puts in issue the title and right of possession, but does

not necessarily raise the question of jurisdiction. Anterior to the act of 1875 this question must be raised by plea before pleading to the merits, but since the act of 1875, it may be pleaded at any time, and may be pleaded along with the pleas to the merits.

Under the statutes of Florida the plea was admissible. The Revised Statutes of Florida, section 1064, clearly entitled the defendant not only to plead the general traverse, but in addition thereto to deny any material allegation of the declaration. A defendant is not obliged to risk his whole case upon whether or not the general issue covers his defense. He may plead the general issue, and at the same time deny any material averment of the declaration.

Sections 1,063 and 1,064 of the Revised Statutes of the State of Florda read as follows:

"Section 1,063. The defendant may plead as many matters of fact as he may deem necessary to his defense."

"Section 1,064. A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it *may have been included in a general traverse.*" This plainly means that although a general traverse has been already filed, the defendant may answer separately any material allegation in the declaration.

The Court therefore erred in refusing the motion to dismiss for want of jurisdiction on the face of the declaration and in denying the motion to file plea numbered two, and erred in not dismissing the case in itself on the reading of plea numbered two, when it was tendered to be filed, and in this case should be reversed on these grounds.

No Jurisdiction on Account of Citizenship.

It may be urged by the defendant in error in this case, that although the summons and declaration did not state the citizenship of but two of the parties plaintiff, that this failure to state a case in the declaration, of jurisdiction on account of citizenship as to the rest is immaterial, and that the Court had jurisdiction on the ground of citizenship of the two. The præcipe for summons, (page 1 of the record) and the summons state that William J. Bell and John W. Bell are citizens of the State of Texas, and do not state the citizenship of the other plaintiffs. None of the pleadings state a case of citizenship as to the other plaintiffs. The Court in its findings (page 15) finds in favor of each of the plaintiffs, by name, and that they *each* have an undivided one-sixth part, except George A. Bell and Simon Bell, who each have an undivided one-twelfth part, and the judgment (page 16 of the record) *is jointly in favor of all* of the plaintiffs.

This was a *joint suit* brought in the name *of all* the plaintiffs to recover jointly. They do not seek to recover undivided interests, and therefore, where only two are shown to have the citizenship necessary to give jurisdiction, and the recovery must be by all of the plaintiffs jointly of the entire property, this suit should have been dismissed entirely, for want of jurisdiction, because all, except two, of the plaintiffs are not shown to have the requisite citizenship to maintain the suit. Even if the Court should hold that two of the plaintiffs, William Bell and John W. Bell, who are alleged to be citizens of Texas, can recover in this action their respective undivided interests, it is clear that the motion to dismiss for want of jurisdiction should certainly have been granted as to all of the other plaintiffs, except William J. Bell

and John W. Bell. If said William J. Bell and John W. Bell have any right of recovery at all in this suit, which we deny, they could only recover repectively their undivided one-sixth interest, and the rest of the plaintiffs had no right whatever to sue in this court, but the court gave judgment in favor of all of the plaintiffs jointly, including said William J. Bell and John W. Bell, together with the other plaintiffs also, and that they *jointly* should recover the entire tract, as shown by the judgment.

The finding of the Court (pages 14 to 16 inclusive of the record) found the several undivided interests of the respective plaintiffs in the said land, but the judgment (page 16 of the record) adjudges in favor of the plaintiffs jointly for the entire premises.

Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in the courts of the United States.

Strawbridge vs. Curtiss, 3 Cranch, 267;

Followed, as applied to Act of 1887 by Smith vs. Lyon, 133 U. S., 315,318.

Also followed :

N. O. vs. Winter, 1 Wheat, 91;

Coal Co. vs. Blatchford, 11 Wall, 172, 174;

Sewing Mach. Cos., 18 Wall, 553 ;

Peninsular Iron Co. vs. Stone, 121 U. S., 631.

"In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

Coal Co. vs. Blatchford, 11 Wall, 172, (Per Field):

See Karns vs A. & O. Ry., 10 Fed. Rep., 309.

If a plaintiff is a citizen of the same state as defendant, fatal to jurisdiction either original or by removal, unless claimed under separable controversy clause.

Peper vs. Fordyce, 119 U. S., 469.

In removal cases, held that to make a separable controversy, there must be a separate and distinct cause of action which can be fully determined without the presence of other parties to the suit, as it has been begun.

Fraser vs. Jennison, 106 U. S., 191, 194;

Ayres vs. Wiswall, 112 U. S., 192.

Where interests of parties are so mixed up and identified that they must and should be decided together, no separable controversy exists.

Wilson vs. Ry., 22 Fed. Rep., 3, per Miller, Jus.

Even where resident defendant defaulted and no controversy left as to him, non-resident cannot remove.

Brooks vs. Clark, 119 U. S., 512.

In the case of removals not under the separable controversy clause, the jurisdiction is defeated, if any necessary plaintiff is a citizen of the same State as any necessary defendant.

Removal cases, 100 U. S., 469.

The two plaintiffs who are citizens of Texas cannot recover more than their own undivided interests.

Stevens vs. Ruggles, 23 Fed., cases, 13, 408;

Newell on Ejectment, 83;

Hicks vs. Rogers, 4 Cranch, 166;

Mattox vs. Boggs, 28 N. W., 325;

62 N. Y., 475.

In common law tenant in common may maintain ejectment.

Tyler on Ejectment, 56.

Ejectment will lie by A. against B. for an undivided one-half interest, and statutory form of declaration is sufficient.

Gale vs. Hines, 17 Fla., 773.

Ejectment will lie by tenant in common against co-tenants after ouster.

Kearnes vs. Hill, 21 Fla., 185.

1 Chitty Pl. says that parceners must join, but tenants in common serve in real actions.

6 A. & E. Encyc. L. 206, 244, says that tenants in common should join, but seems to refer to statutes.

"One joint tenant ought not to recover the whole land and when the subject of a suit is entire, a part thereof cannot be recovered."

Webster vs. Vandementer, 6 Gray, 428, 431.

Tenants in common cannot sue in real actions jointly, but must bring separate actions.

11. A. & E. Encyc. L. 1137.

The Court had no jurisdiction whatever of this case on the part of the plaintiffs, other than William J. Bell and John W. Bell based on the ground of citizenship, and therefore the judgment in favor of the other plaintiffs and entertaining the case of the other plaintiffs was error for lack of jurisdiction in the Court, and the said joint judgment in favor of all the plaintiffs, was void for want of jurisdiction.

Third Assignment of Error.

The third assignment of error was to the refusal of the Court to entertain defendant's pleas, 3, 4 and 5.

Plaintiff Matilda P. Feihe Insane.

The third additional plea was that Matilda P. Feihe was insane and the suit could not be maintained in her name individually. The third additional plea, to file which leave was prayed (see pages 12 and 293 of the Record), set forth that one of the plaintiffs, Matilda P. Feihe, was a person *non compos mentis*, and that she could not maintain this suit, or the suit could not be maintained in her name. An insane person cannot make a contract, and cannot bind themselves to pay the costs, and are not bound by any judgment against them. This is well settled at the common law.

In this case one of the plaintiffs, as set up in the plea, was an insane person. The plea was a proper defense as to any attempted recovery in her name, and it should have been admitted by the Court. If the defendant had succeeded in this action, it would have been no bar to an action brought hereafter by the said Matilda P. Feihe, if she recovered her reason, or to any action brought by any guardian or committee hereafter appointed by the Court to take charge and sue for her estate. If the defendant should recover judgment against this plaintiff for costs, it should not be enforced or collected and such judgment would be no bar to future suits, and therefore this suit should have been dismissed as to her. A recovery in the name of an insane person is a nullity. It would be in the highest degree unjust to permit a suit to be maintained in the name of a person

against whom no judgment would be effective. An insane person must sue by a committee or guardian.

Bird vs. Bird, 21 Grattan, (Va.) 712.

Chicago &c. R. Co. vs. Munger, 78 Ill. 300.

Dearman vs. Dearman, 5 Ala., 202.

Warden vs. Fichbaum, 14 Pa. St., 121.

Hays vs. Miller, 81 Mo., 424.

Whetstone vs Whetstone, 75 Ala, 495.

The laws of the State of Florida require suits by lunatics to be brought by the guardian. Section 982 reads as follows:

"INFANTS, LUNATICS, ETC.—An infant may sue by his next friend in all cases whatsoever, and idiots and lunatics by their guardians."

The Court, therefore, erred in refusing to permit the third plea to be filed, or to entertain the same, as defense, and it having been suggested to the Court by this plea that this plaintiff was insane, the Court erred in rendering a judgment in her favor in this cause.

Chancery Suit and Condemnation Proceedings.

The pleas numbered 4 and 5, (page 8 of record), in effect state that the plaintiff in error, defendant below, constructed its road upon this property by leave of the United States Circuit Court, under an order dated January 2, 1890, in a chancery suit brought by the same parties as complainants who were plaintiffs in the suit above, against the defendant railroad company, which order of the Circuit Court authorized the giving of bond by the defendant company, and also provided that the injunction

granted in the case be dissolved on the defendant company acquiring title to condemnation proceedings.

Plea number 4 set up the condemnation proceedings, and plea numbered 5 showed that the defendant railroad company went on the land and in possession of it under such circumstances as not to be a trespasser, and brought the case within the rule that ejectment would not lie against this defendant railroad company to oust it of the possession of the property, but that plaintiff's cause of action was a suit for the value of the land taken.

This Court has determined that wherever possession of a right of way is acquired by a railroad company and its track constructed upon the land under circumstances which render it inequitable for the owner of the land to maintain ejectment, but must sue for the value of the land.

See Roberts vs. No. Pac. R. R. Co., 158 U. S., 1.
No. Pa. R. R. Co. vs. Smith, decided May 31, 1898.
Supreme Court Rep. Vol. 1 18, No. 29, page 794.

This last case, in its facts, is very similar to the case at bar. The defendant railroad company in the case at bar before the Land Department of the United States claimed a right of way over this land, but this claim was denied by the United States Land Department and a patent issued to the plaintiff below. In 1890, at the time the defendant railroad company constructed its road across the land in question, the United States Land Department had not yet determined whether the plaintiffs below were entitled to a patent, or whether the defendant railroad company had a right of way over the land. The defendant, under these circumstances and pending the chancery suit above mentioned with the defendant railroad company, built and constructed its road across the land in question, after giving the bond required by the United

States Circuit Court for the Southern District of Florida to protect the plaintiffs' rights. It is, therefore a case in which judgment in ejectment should not be permitted to stand.

The Fourth Plea—Condemnation Proceedings.

The fourth plea set up that the defendant located its road on this land in December 1889, and January 1890; that it laid its tracks there and has continuously ever since maintained and operated the railroad thereon, that on the 21st of December, 1896, it filed its proceedings for partition in the Circuit Court for the Sixth Judicial Circuit in and for the County of Hillsborough, for the purpose of having condemned the said land under its right of Eminent Domain, and condemnation under the laws of the State of Florida: that at the time of offering to file the plea that those proceedings were pending and undisposed of, and that in and by said proceedings the defendant would acquire any title claimed by the plaintiff, and that compensation would be awarded in said proceedings to plaintiffs and paid to plaintiffs, for any claim of title, or right to said property.

The Court on February 18th, 1897, refused to permit the filing of this plea, or to entertain this as a plea in the action. It was competent for the Court to have permitted the filing of the plea and to have suspended the hearing of this case until the condemnation proceedings were finally disposed of. It has been held in Florida that a judgment in *ejectment* will be suspended pending condemnation proceedings.

And this has also been decided in other States to be a good defense to an action to recover the property.

J. T. & K. W. Ry. Co. vs. Adams 28, Fla., 637.

See Patterson, etc. R. R. Co. vs. Kamlah, 42 N. J., Eq., (28 Am. & Eng. R. R. Cases, 250).

Lewis Em. Dom., Sec. 534.

Pittsburg R. R. vs. Bruce, 102 Pa. St. Repts., 23, (10 A. & E. R. R. Cases 1).

Conger vs. R. R. Co., 41 Ia. 419.

Fifth Assignment of Error.

The fifth assignment of error was a motion for continuance of the case, on the ground that the Florida Central and Peninsular Railroad Company was engaged in pursuing condemnation proceedings in the State Court, to require title to the land, and had built its road on the land in good faith, and that the said Florida Central and Peninsular Railroad Company went into possesion on order of his Honor Don A. Pardee, on giving a bond of $5,000 subject to condemnation proceedings.

We submit that this presented sufficient ground for a continuance of the cause, so that no judgment should be entered pending such condemnation proceedings.

It has been held in Florida that judgment in ejectment would be suspended pending condemnation proceedings.

See Patterson, etc., R. R. vs. Kamlah, 42 N. J. Eq. 93, 28 A. & E. R. R. Cas. 250.

Lewis Em. Dom., 634.

Pittsburg R. R. vs. Bruce, 102 Pa. St. 23, 10, A. & E. R. R. Cas. 1.

Conger vs. R. R., 41, Iowa 419.

The Florida Central & peninsular Railroad Company went into possession of this property in good faith and built upon the property long before any patent issued to plaintiffs and was duly seeking to condemn the land. This presents a question which should be examined in the cause. It is true that on the 5th of March, 1897 the amended petition for condemnation was dismissed by the State Court, but it was without prejudice to the filing of new petition by petitioner and an affidavit for continuance. Motion for continuance was made on February 18th, 1897, and denied on that date, pending condemnation proceedings. (See page 10 of the record.) So that the record did in fact show that the company was proceeding to condemn and was entitled to file amended condemnation proceedings under the order of the State Court and that a cause of condemnation was pending.

In this connection the third assignment of error may be considered. This was the error of the Court below in refusing to grant its motion for continuance (Found on pages 10, 11 and 12.) This motion was supported by affidavit of Peter O. Knight showing how the defendant entered upon this land, and that at the time it laid its tracks upon the land numerous persons were attempting to make entries in the United States land office of the property, and otherwise acquire title to it, and it was impossible for the defendant then to acquire title by condemnation. That these same plaintiffs sought by a bill for injunction on the 21st of January, 1890, to restrain the defendant from laying and constructing its tracks on said land, and that his Honor D. A. Pardee, issued an order providing that if the defendant should give bond in the sum of $5,000.00, conditioned that whenever the plaintiffs obtained title from the United States Govern-

ment to said land, that then and in that event defendants should in good faith institute condemnation proceedings against plaintiff for the purpose of acquiring title to said land, also that defendant did give said bond and has constructed its depots and tracks on said land, and that the lands are necessary to the operating of its said road in Tampa, Florida, and that the defendant has instituted condemnation proceedings against the plaintiff for the purpose of acquiring title to the land that its tracks are located on, and that it would be a great loss to the defendant and injury to the public interests to compel it to remove its tracks from this lot.

This motion came on to be heard on February 18th, 1897, and was denied. (See page 12 of the printed record.)

Under the authorities cited above, the defendant was entitled, on giving property security at least to have this suit continued until it had full opportunity in the State Courts to litigate its right to condemn this property, but the Court denied both the filing of the plea and the motion for a continuance, in effect holding that the condemnation proceedings, or bona fide effort to condem, and the fact that defendant had built its tracks under an order permitting same in a Chancery cause wherein the plaintiffs were complainants, did not entitle defendants to any continuance or to any suspension of the trial of said action. It is true the condemnation proceedings were afterwards, on trial, put in evidence (found on pages 133 to 156 inclusive), and that the order was made in said condemnation proceedings, after the motion for contiuance had been overruled, to-wit, on the 5th of March, 1897, dismissing the amended petition for condemnation, but without prejudice to the filing of a new petition by the petitioner, the railroad company, the defendant in this cause.

A motion for a continuance in this cause was made on February, 18th, 1897, and denied that on that date pending condemnation proceedings, so that at the time the order was made denying the right to file the plea, and at the time the order was made refusing to continue the case until the termination of the condemnation proceedings, the record showed that the company was endeavoring to condemn the land, and even if the petition for condemnation then on file was afterwards dismissed on the ground of the technical objections to the form of the same set up in the answer to said proceedings, the order of the Court permitted the defendant to file another petition for condemnation proceedings and the cause of condemnation was still pending in the State Court, subject to amendments, and not finally disposed of, and before the amended petition could be filed, the Court below in this case went into the trial of same and gave judgment in favor of the plaintiffs. The refusal of the Court below to continue this case, or to entertain the plea setting up the condemnation proceedings, in any event excuses the defendant from continuing condemnation proceedings until it should be determined by this Appellate Court, that the pendency of the condemnation proceedings in the State Court entitled the defendant to an order either abating or continuing the ejectment suit in the Federal Court, as the defendant in this cause was forced to prosecute this writ of error, and to assign as error the refusal of the Court below, before any termination of the condemnation proceedings, to suspend the ejectment suit pending condemnation proceedings.

It will be noted in the answer of these plaintiffs as defendants to the condemnation proceedings in the 4th paragraph of said answer, they set up the pendency of the bill in equity brought by the plaintiffs in this suit in the Federal Court on its equity side and alleged

the pendency of that suit, in bar of the condemnation proceedings. (See page 145 of the Record). This was the equity suit in which Judge Pardee made his original order permitting the defendant Railroad Company to occupy the land on giving bond, and it may be that the State Court intended to determine that the condemnation and acquiring of title to the property should be had in that equity suit. If so, the Court below also erred in refusing to permit the filing of the defendant's fifth additional plea (pages 7 and 8 of the Record), in this ejectment suit, which plea sets up the pendency of this identical suit in equity and that all of the questions should be determined in that equity suit.

This 5th plea recites the history fully of the defendants going upon this land, that the plaintiffs sought to enjoin them, and the order of Judge Pardee, of January, 1890, providing for the defendant giving bond and acquiring title under condemnation proceedings, that they were permitted to go upon the land, and on the 22d of December, 1896, after plaintiffs perfected their patent they filed a supplemental bill in the same original equity suit praying an injunction and compensation for the value of the land, and that defendants, had answered that supplemental bill and the pendency of the equity cause, and also that it had commenced condemnation proceedings in the State Court, to-wit, the Circuit Court of the Sixth Judicial Circuit of Hillsborough County, Florida, for the purpose of condemning this property under the laws Eminent Domain of the State of Florida. The Court below held and determined that the plea should not be filed. This plea ought to have been filed at least to compel the election by plaintiffs of their remedy and dismissal of either the equity suit or the law suit, and it should also have been filed so that the defendant might dimin-

ish any alleged damages, by showing that they went upon this land in good faith under the provisions of an order of the United States Curciut Court for the Southern District of Florida in a cause brought by the plaintiffs themselves, and the Court below therefore erred in refusing to permit the filing of said plea.

Sixth Assignment of Error. The refusal of the Court to admit in evidence the record of the chancery suit.

The sixth assignment of error was the rufusal of the Court below at the trial to permit the introduction of any evidence of the chancery record in the case pending between the same parties, bill filed in December, 1889, which record showed that the defendant Florida Central and Peninsular Railroad Company entered into possession of said land at the time under the order in the Chancery suit, that upon giving of a bond for $5,000, the injunction would be dissolved, granted in the said suit. The defendant was entitled to introduce this record to show the pendency of an equity suit involving the same subject matter and to show how the defendant came into possession of the property. Exception was duly taken to the action of the Court refusing permission to file this record: as shown by the bill of exceptions, see page 113 of the record.

The Court undoubtedly should have permitted the introduction of this Chancery record in evidence, to show the facts under which the defendant railroad company went into possession of the property. These facts amounted to an adjudication under the order of the United States Circuit Court and acquiesence there in by the plantiff's below, that on the giving of the

bond of $5,000, and the bringing of condemnation proceedings that the defendant railroad company might build its railway across the land in question.

Under the decisions of this Court ejectment will not lie to oust a railroad company in possession of part of its right of way on which a railroad is constructed and being operated, because the public as well as the parties have an interest in the continued operating of such railroad.

Roberts vs. No. Pac. R. R. Co., 158 U. S., 1;

No. Pac. R. R. Co. vs. Smith, decided May 31, 1898;

Sup. Ct. Rep., Vol. 18, No. 29, page 794.

The Court should have permitted this record to be introduced in evidence. It went also to the measure of damages against the defendant for entering upon the land.

It showed that the defendant entered under a claim of right and in good faith, intending to condemn the property whenever the plaintiffs, or anybody else acquired the title so that defendant could condemn.

Good faith affects the measure of damages, Lawrence vs. Rector, 137 U. S., 139;

New Orleans vs. Gaines, Admr., 131, U. S., 191;

Worthington vs. Neiss, 70 Md., 172, 16 Atlantic Rep., 534.

This Chancery suit, (found on pages 113 to 131 of the record) and the proceedings in the office of the Secretary of the Interior (found on pages 29 to 50 inclusive of the record) shows that a great number of persons beside plaintiffs claimed a right to acquire this land from the United States Government, that it was a part of a former Military Reservation known as Ft. Brooke Military Reservation at Tampa, Florida, and that in December, 1889, at the time defendant needed to go across the land, the

title still was in the United States and numbers of claimants thereto, and under these circumstances, Judge Pardee made his order above mentioned. The affidavits filed in that case showed the absolute necessity of defendants crossing this lot with its tracks to reach the Hillsborough River at Tampa, Florida.

Under these circumstances, the plea of pendency of this Chancery suit, and the introduction in evidence of the record in the Chancery suit was relevant. The defendant was seeking at the time this evidence was offered to condemn this property in accordance with the order of Judge Pardee in the Chancery suit, and the evidence was material as to the nature of defendant's possession and the measure of damages.

Lawrence vs. Rector, 137 U. S., 139;
New Orleans vs. Gaines Admr., 131, U. S., 191.

It is held in Florida that if the defendant railroad company actually lays its tracks upon the land, but without the owner's permission, it will not be thereafter enjoined from operating its railroad upon the land; and therefore it should certainly not be ousted from the possesion of the land where it is already operating its railroad and is willing to condemn the premises and pay a fair valuation for the property. See Moody vs. J. T. & K. W. R. Co., 20 Fla., p. 616.

Seventh Assignment of Error. Plaintiff's right of possession.

The seventh assignment of error goes to the very merits of the title as between the plaintiff and defendant.

The Court below refuses to dismiss for want of jurisdiction or to entertain defendant's plea that it did not claim under a law of the United States.

The plaintiff put in evidence the claim of title of both plaintiff and defendant made before the Interior Department, found on pages 23 to 50 of the record. Before the Interior Department the plaintiff claimed the right to pre-empt the land, although it had been part of a military reservation, and defendant before the Interior Department claimed a right of way across the land under an act of Congress.

If the Court below entertained jurisdiction of this case and were justified in so doing, the plaintiff in error here has a right to have it determined in the appellate court whether or not the action of the Interior Department as a matter of law was correct in holding and determining that the defendant was not entitled to a right of way accross this land under an act of Congress of 1856. In other words, the question of plaintiffs' and defendants' title, the defendant has a right to have determined in this Court, and to review the finding of the Court below on this subject.

Seventh Assignment of Error. Plaintiff's right of possession.

The Court found and held that the plaintiffs had at all times within seven years before the commencement of this action, been entitled to exclusive possession of said tract or body of land described in the said findings and *not the land as described in the declaration.* There are two questions to be determined under this assignment of error.

1st. On the law of the case, if the Court entertained jurisdiction of this case, was the plaintiff entitled, as against the defendant, at all times, from the time defendant entered upon the land in January, 1890, to the pos-

session of said land. Defendant, in this case, by its pleas it offered to file, disclaimed attacking the patent issued to the plaintiffs and disclaimed any claim of title by defendant under the laws of the United States, and insisted that the court below had no jurisdiction to try the case.

The plaintiffs, themselves, put in evidence the record of the Interior Department and the decision of the Acting Secretary, John M. Reynolds (pages 20 to 30 inclusive of the record), and of S. W. Lamereaux, commissioner, (pages 50 to 51 of the record,) showing *defendant's claim of right of way across his land.* The commissioner and acting secretary held, in effect, that although the defendant by authority of an act of Congress, May 17, 1856,(11th Stat. at L. 15) was entitled to a right of way across any reserved public lands (See provision of the statute on page 30 of the record), yet because the *original* line of definite location, filed by the predecessor of the present railroad company, was not on the line *actually constructed* on this lot in question, but passed through lot sixteen in the same reservation, some distance north, but within the six mile limit, that the defendant company could not claim a right of way over this lot eight. The legal effect of the decision was that by filing the line of location in the Interior Department, passing through this reservation on lot sixteen, (see map, page 90½ of the record), that the defendant could not afterwards construct its road on lot 8, section 24, township 29 south, range 18 east, although within the lateral limits of its said grant, under said act of congress.

If this court determines that the court below was authorized to entertain jurisdiction of this case, we submit that it erred in deciding that plaintiffs were entitled to recover from defendant the land on which it laid its tracks on said lot 8.

The grant under which the defendant constructed its

road, to-wit, the Act of Congress, May 17th, 1856, (11th Stat at L. 15), and the proviso therein contained does not limit the right of way of any railroad constructed under said grant to the *exact piece* of land on which it fixed the line of definite location by filing of maps. It distinctly grants every alternate section designated by odd numbers for six sections in width on each side of said road, making the lateral lines six miles in width, and it further provides that on any lands reserved by the United States for public purposes that the reservation is to continue, " except so far as it may be necessary to locate the routes of said railroad, or branch, through such reserved lands, in which case *the right of way* only shall be granted subject to the approval of the President of the United States.

We submit that under this grant, the defendant was entitled to a right of way across lot 8, the land in question, as a part of Ft. Brooke Military Reservation anywhere within six miles of its located line. Where it is seeking merely to acquire *right of way*, the map of definite location is required by the Act of Congress. The map of location is only for the purpose of reserving the land grant. The right of way is given wherever it is found *necessary to locate* the routes of said railroad or branch through such reserved lands. The grant of the right of way was a grant *in presenti*, and it was intended to attach at the time of the actual locating of the route by the constructing of the road through such reserved lands. Any person acquiring any rights within the six mile limit even of the line as filed will take subject to this right of way *wherever found necessary in actually constructing the road through such reserved lands.*

The evidence filed with the chancery record (See pages 113 down to 115 inclusive, of the record) and the affidavit of Peter O. Knight (pages 10 to 12 inclusive)

clearly shows that to reach the town of Tampa as a terminal, this road necessarily had to be constructed over said lot 8, involved in this suit, and it was necessary for the purposes of the road. Under the terms of the said Act of Congress of May 17th, 1856, the right of way passed to the defendant before the alleged entry by Lewis Bell in 1883 or the patent to plaintiffs.

The authorities cited by the Commissioner of the Land office and Secretary of the Interior holding that the defendant had no right of way over this lot eight in said Reservation are not applicable, and do not sustain their decision.

The decision of the United States Supreme Court in case of Baldwin vs. Railroad Co., 103 U. S. 196, is more directly applicable to the exact language of the Act of Congress in question.

See also the case of No. Pac. R. R. Co. vs. Smith, decided May 31, 1898, Sup. Ct. Rep. Vol. 18, No. 29, page 794.

This property was a part of the Fort Brooke Military Reservation and immediately adjoins the City of Tampa, as shown by the plats in evidence in the case. The plaintiffs claim title by reason of an alleged attempted homestead entry of property by Louis Bell on the 22nd of March, 1883. The land was not subject to homestead entry, and it should have been disposed of, if disposed of at all, either as a town site, or under Section 2364 of the United States Rev. Stat. This was the decision of Secretary Teller, Vol. 2 L. D., 606, quoted on page 42 of the record in this case, but was afterwards

overruled by Secretary Smith when the patent to the plaintiffs was allowed. We submit that the holding of Secretary Teller was clearly correct. The reading of the acts of Congress permitting homestead and pre-emption claims upon pu blic lands will show that said laws were not intended to apply to portions of a Military Reservation, either in or immediately adjoining a large town. These lands were not agricultural lands, or lands which could be as regarded as homestead lands.

The Court further erred in holding that during the entire time since January 1890, plaintiffs are entitled to the possession of this property as against the defendant. As stated above, the record in the Chancery case brought by these plaintiffs in December, 1889, (found on pages 113 to 131 inclusive) show that these plaintiffs filed their bill claiming a right of possession of this land, and to enjoin the defendant from constructing its road upon the land, and thereby submitted their rights to the decision in the said cause before defendant went upon the land. At this time the plaintiffs had no patent to the land and simply claimed that Louis Bell, their ancestor, had in 1883, filed his declaratory statement, for the purpose of entering the land and afterwards offered to pre-empt and purchase the land from the United States under the pre-emption laws. This condition of affairs continued to exist until the said patent was issued to the heirs of Louis Bell on the 29th of July, 1896. (See pages 42 to 43 of the record).

On the case made in the chancery suit, his Honor Judge Pardee, made an order (found on pages 131 and 132 of the record), providing that the injunction restraining the defendant from entering upon and constructing and operating its road through the land should be dissolved upon the defendant company executing a bond in

favor of the complainants, conditoned to pay all damages that might result to complainants from said completing of said road *whenever the said complainants shall obtain title thereto from the United States,* or whenever the defendant shall obtain judgment condemning the land for railroad purposes.

It is plain that the force and effect of this order in a case in which these plaintiffs were complainants, was to give the defendant possession upon the filing of this bond. The bond was duly filed (See affidavit of Peter O. Knight, page 11, and fifth plea, page 9 of the record). From that time, the defendant's possession was a lawful possession up to the time of the issuing of the said patent, to-wit, the 29th of July, 1896. The plaintiffs were never entitled to the possession of the land used by the defendant for its track and right of way during seven years preceding the date of judgment, because during the period of time between January, 1890, and the issue of the patent on the 29th of July, 1896, the defendants were in possession of the said land under the force and effect of said order said chancery suit, and they gave bond as provided in said order, and further because the plaintiffs had no legal title during the said period of time. The title was in the United States and claimed by various different claimants, as shown by the records from the General Land Office and the Interior Department in this cause. (See pages 35, 36, and pages 27 to 50 of the record).

Eighth and Ninth Assignments of Error.

Damages and mesne profits prior to the issuing of patent or determination of the question of said title by the Secretary of Interior.

The Court below in its findings and decision determined that the plaintiffs were entitled to mesne profits from the date of the alleged entry upon the land by plaintiffs, to-wit, December, 1889, or January, 1890. This we contend is error. The plaintiffs had no title or right of possession as against the plaintiff they could *assert at law* against the defendants in possession of the property. They had only an equitable title, to-wit, under the entry of Louis Bell, made in 1883. This was disputed by numerous other claimants for the same property, as shown by the decision of the Secretary of Interior. The Secretary of Interior did finally decide the case in favor of the heirs of Bell, July 24th, 1894. (See pages 35 to 48 inclusive of the record.) The patent was not issued until July 29, 1896. This entry even had never been recognized up to the decision of the Secretary of Interior above mentioned. It was impossible for defendant to acquire title from plaintiffs by condemnation or purchase, or otherwise. The plaintiffs could not recover the land from defendant because they had no title to it. Under these circumstances, we submit that the plaintiffs could not have maintained a right of action for *mesne profits* or for rent, or any other action against the defendant up to the issue of this patent, and therefore they ought not in this action to recover damages for rents and mesne profits before the issue of said patent.

Tyler on Ejectment, page 844;

Newell on Ejectment, page 607.

Mesne profits and rents can only accompany the right to recover in ejectment in Florida. Such claims for mesne profits when joined in one action with the claim for possession, is only an incident of the main ground of the action, to-wit, recovery of possession under laws of Florida. Plaintiffs had no title up to the issue

of the patent upon which they could recover in ejectment. They had no right to put defendant out of possession then because their entry was not recognized by the United States, and because the defendants were in possession of the lands under the order in the equity suit and bond above referred to.

Revised Statutes of Fla., Sec. 1513.

Tenth Assignment of Error. Damages to Plaintiff.

The Court awarded to the plaintiffs and against the defendants, $1,955. as damages.

The evidence in this case as to the value of the property and the damages do not sustain this finding.

It was established at the trial that this land in question was wild and unimproved, and never had been used for any purpose whatever, excepting a small patch, which was in possession of the Bell heirs, and that the railroad company held possession of under said order in said chancery suit, but that plaintiffs never made anything from it, and the railroad company, at its own expense, put the fence up again, so that they were really not damaged by the taking. The value of the land in dispute beyond question was proved to be worth not more than one thousand dollars per acre. There was no proof upon the part of the plaintiffs that they were ever damaged one iota by the taking of this property. There was no proof that they had ever used it for any purpose, although they had been in possession of it for years, and no proof that they had ever attempted to lease any part of it, or that they could lease any part of it, or that they could sell any part of it, or that they could have used it to any advantage whatever. Plaintiffs could only recover for their damnges, as to a little more than one acre of ground, and it is evident from the finding that the Court

sustained this contention. The defendant should not have paid the Bell heirs any compensation for use of property in January, 1890, and should not have paid them any compensation until the patent was issued. When the patent issued in 1896, defendant could, for the first time, with safety deal with them, and they were only entitled to a fair rental valuation on the property, taken from July, 1896, until the time of the trial. No one would have purchased or rented this property from the Bell heirs in 1890, because there were a number of litigants for the property, and the only thing that the railroad company could have done, would have been to have condemned against all the parties in interest and if they had, the money would have been paid into the registry of the Court and the Bell heirs would not have received the same, until the patent was issued, so that they would not have been benefited one iota by the payment of the money by the railroad company on account of condemnation proceedings.

The Bell heirs could not have used this land for any purposes of aleniation, prior to the issuing of the patent, and certainly no one would have leased this property from them, as it was worth nothing for use, nor for the erection of buildings upon it, on account of the state of the title. Under the homestead laws they could not alieniate it. More than that, there was no evidence to prove, nor did the plaintiffs attempt to prove, that during all the period of years before the trial, that they ever had an opportunity of renting, using or leasing any portion of it, or that it had any rental value. The Court below found that the plaintiffs were entitled to one and three-eighths acres, or in that neighborhood, from January, 1890, and estimated the damages thereon. The Court should have estimated the damages to be just the loss the Bell heirs had proven resulted to them, by reason of the

withholding of the property from them from July, 1896. The Court should then have found that the value of the property in July, 1896, was one thousand dollars per acre; and a rental based on that valuation, or if permitted to base said rental on interest upon said valuation, that plaintiffs were entitled to interest on said valuation as rental, from July, 1896, at the rate of eight per cent. per annum, to the time of the trial, and should have made the damage somewhere in the neighborhood of $125 or $150, and that is absolutely all that they were damaged in this case.

The only proof in this case which was strictly competent upon which to base damages was proof of the rental value, or proof of some amount that the plaintiffs might have secured for the use of the property, while the title was in dispute in the Interior Department. There is no proof of this kind in the Record. There is no proof that it could have been rented for any figure, or that it had any rental value.

Interest upon the different valuations placed by one set of witnesses or the other set of witnesses now upon the land is no legal measure of damages for retaining possession of the land.

See Newell on Ejectment, page 609, Sec. S:

Lawrence vs. Rector, 137 U. S., 139;

New Orleans vs. Gaines, 131 U. S., 191.

Interest on the value of the land is not a proper element of damage.

See Sedgwick vs. Waite on trial of title to land, Sec. 667.

The plaintiffs should have proven that this vacant land had a rental value and that if the plaintiffs had re-

mained in possession of it, they either could have rented it for a given sum, or that they lost the use of it and by the use of it they could have made some sum of money proven. No such proof was made in the case.

Eleventh and Twelfth Assignments of Error.

The eleventh and twelfth assignments of error are in effect that the Court found a judgment in favor of plaintiff to recover an entirely different piece of land from that described in the declaration, and further that the Court Court could not make any finding or judgment for recovery on the description in the declaration, the same was too vague and indefinite upon which to base any judgment or finding. A comparison of the land described in the judgment of the Court, with the delaration, will show that the Court attempted to work out its own description of a different piece of land from that described in the declaration. An examination of the land decribed in the declaration will show no sufficient metes or bounds or measurments are given to describe the land sued for. No judgment or right of possession thereon could properly be executed on the land described in said declaration.

In Florida the judgment in an action of ejectment must describe exactly the property recovered and must find a right of possession in the plaintiff of that particular land, and must state the quantity of the estate of the plaintiff in the particular piece of land described in the verdict and judgment.

Horne vs. Carters, Admr. 20, Fla., 51;
Ashmead vs. Wilson, 22 Fla., 255;
Sedgwick & Wait on Trial of Title, etc.;
Sec. 457, 458, 459, 463.

Section 1515 of the Revised Statutes of the State of Florida is as follows: "A verdict for the plaintiff shall state the quantity of the estate of the plaintiff and describe the land *by its metes and bounds*, by the number of the lot or other certain description." The judgment awarding possession shall in like manner state the quantity of the estate, and give a description of the land recovered.

In order to carry out and enforce this statute the declaration must state a sufficient description and the finding must follow the land described in the declaration.

See Asa vs. Hiser, 27 Fla., 378;
Patrick vs. Young, 18 Fla., 50;
Lungren vs. Brownlie, 20 Fla., 491;
Neal vs. Spooner, 20 Fla., 38;
Slacum vs. Pomery, 6 Cranch, 221.

Judgment Not in Accordance With Findings.

The findings in this case find that William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell, and Matilda P. Feihe, nee Bell, have and own an undivided one-sixth part and interest in said land, and that George A. Bell, and Simon Bell have and own each one undivided one-twelfth part and interest in the said land.

The judgment in this case adjudges that all of the plaintiffs recover from the defendant the sum of $1,954.00, and that the plaintiffs have a fee simple title in and to the lands and premises described, as follows, (describing the lands): There is no judgment for their undivided interest, and the *judgment does not award possession of their undivided interest*, or adjudge their title to their several undivided interests in accordance with the findings. The judgment, therefore, is not supported by the findings and

should be reversed. As far as there is any judgment, it is a joint judgment in favor of each and all of these parties, that they each and all of these have a fee simple title to the entire tract (not specifying what their interests are). This is not in accordance with the findings or with the statutes of the State of Florida above cited.

The declaration in this case is a joint declaration seeking to recover the entire property, but states that all of the plaintiffs, except George A. Bell and Simon Bell are heirs of and children of Louis Bell, and that George A. Bell and Simon Bell are heirs of and grand-children of the said Louis Bell.

The findings find that they have undivided interests, as above stated, in the property. The judgment does not adjudge anything in favor of the plaintiffs as to the right of possession and adjudges that all of them have a fee simple title to the entire property. The judgment does not conform to the declaration of the findings. The findings stand in the place of a verdict, and the judgment in ejectment must follow the verdict as to the question of interest, estate, right of possession and land to be recovered.

As we have heretofore argued, there is not a sufficient description of the property in the declaration to warrant any judgment, nor to authorize the recovery of the tract of land attempted to be described in the findings, and no sufficient description even in the findings upon which to base a writ of possession.

We submit that for the reasons hereinbefore stated that the judgment in this cause should be reversed and the cause remanded.

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No. 95.
Supp. Brf. of Plff. in Err.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 95.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM J. BELL ET ALS., DEFENDANTS IN ERROR.

Supplemental Brief for Plaintiff in Error.

WILLIAM WIRT HOWE,
For Plaintiff in Error, Defendant Below.

OCTOBER 24, 1899.

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Supplemental Brief for Plaintiff in Error.

A brief has already been filed in this cause by my learned associates, to which reference is made for a statement of the salient facts in the case.

The assignment of errors is found in the Transcript, printed pages 182–185.

ASSIGNMENT OF ERRORS.

First. The circuit court held and decided that, although William J. Bell and John W. Bell, of the plaintiffs, were citizens of the State of Texas; Frank A. Bell, E. A. Bell, Matilda P. Feihe, George A. Bell, and Simon L. Bell, of

plaintiffs, were citizens of the State of Florida, and defendants a corporation organized and existing under the laws of the State of Florida, said court had jurisdiction of said cause, and said court of appeals erroneously affirmed said ruling, and this decision and the ruling of said court of appeals is hereby assigned as error.

Second. The court below held and decided that, although the defendant admitted that before the commencement of the suit in ejectment a patent was issued from the United States to the plaintiffs for the land described in plaintiffs' declaration, and that defendant did not, at the time of the commencement of the suit nor at the time of the filing of the pleas, claim and insist that plaintiffs derived no title to the said land, and although the defendant insisted that it did not claim any title to the said land under the laws of the United States of America or under any act of Congress or any law of the United States, but that it admitted absolutely the title of the plaintiffs under and by virtue of the patent issued, yet that said circuit court had jurisdiction of said cause; and said circuit court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Third. That the circuit court refused to permit the defendant to file the additional pleas numbered 2, 3, 4, and 5, and the said court of appeals erroneously affirmed said ruling, and this decision of said court of appeals is hereby assigned as error.

Fourth. The circuit court refused to grant defendant's motion to dismiss for want of jurisdiction, and the said court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Fifth. The circuit court refused to grant defendant's motion to continue said cause for the reason that the condemnation suit was pending, and the court of appeals erroneously affirmed said ruling, and this decision and ruling of said court of appeals is hereby assigned as error.

Sixth. During the trial of said cause in the circuit court the defendant there offered in evidence a certain chancery suit instituted in December, 1889, by plaintiffs against defendant to enjoin the defendant from entering on the land described in plaintiffs' declaration, in which said chancery suit the fact was set forth fully that no one at said time had title to said land, and in which said chancery suit an order was made by the Honorable Don A. Pardee, as judge of the United States circuit court, permitting the defendant to enter upon said lands and construct its tracks thereupon, conditioned that it should acquire title by condemnation whenever a patent was issued by the United States Government to plaintiffs, said proceedings being introduced for the purpose of showing the manner and good faith of the entering upon said land by defendant, and the circuit court did decline to permit the defendant to introduce said chancery record in said cause as evidence; which ruling the said court of appeals erroneously affirmed, and this ruling and decision of said court of appeals is hereby assigned as error.

Seventh. That the circuit court erred in finding and deciding, as a matter of law, that plaintiffs have at all times within seven years next before the commencement of this action been entitled to the exclusive possession of said tract or lot of land hereinafter described, and entitled to such an amount, in the form of damages and mesne profits, as would fully compensate them for any damages that have been sustained and any loss of rents and profits which have been caused by the unlawful trespass and possession of the de-

fendant below, and this ruling was erroneously affirmed by said court of appeals, and this ruling of the court of appeals is hereby assigned as error.

Eighth. That the circuit court erred in finding that plaintiffs below were entitled to damages for any mesne profits prior to the date of the issuance of the United States patent to them, and this ruling was erroneously affirmed by said court of appeals; which ruling of said court of appeals is hereby assigned as error.

Ninth. That the circuit court erred in finding that the plaintiffs were entitled to damages and to mesne profits prior to the time that there was a final adjudication as to the right and title of the litigants to this property by the Secretary of the Interior, and this ruling was erroneously affirmed by the said court of appeals; which said decision of said court of appeals is hereby assigned as error.

Tenth. That the circuit court erred in finding as a matter of fact that in damages and in the loss of rents and profits the plaintiffs have been injured and damaged to the extent of one thousand nine hundred and fifty-five dollars, and this ruling was erroneously affirmed by the said court of appeals; which decision of said court of appeals is hereby assigned as error.

Eleventh. The circuit court held and decided that although there was no description by metes and bounds or otherwise in plaintiffs' declaration of the land in controversy, as required by the statute of the State of Florida, yet the court held and decided that the plaintiffs below were entitled to their respective shares, as set forth in the findings of the court, to the following-described lot or tract, to wit: A strip and parcel of land, being a part of lot eight, section twenty-four, township twenty-nine south, range eighteen east, of the

meridian of Tallahassee, State of Florida and county of Hillsborough, known and described as follows, to wit: Beginning at a point in the east boundary line of said lot eight at a distance of seventy-five feet in a south direction from the northeast corner of said lot, running southwesterly parallel to the northwesterly boundary line of said lot to the western boundary line of said lot eight fourteen hundred and twenty-four feet (1,424 feet); thence south on said western boundary line 75 feet; thence northeasterly on a line parallel to the said northwestern boundary line of said lot to the eastern boundary of said lot; thence north along said eastern boundary line 75 feet to the place of beginning; and the said court of appeals erroneously affirmed said rulings, and this finding of law and fact by and action of the said court of appeals is hereby assigned as error.

Twelfth. That the circuit court erred in finding that there was any description in the declaration or any description of the land in controversy in evidence sufficient upon which to base a finding of judgment contemplated by the statutes of Florida, and this ruling and finding were erroneously affirmed by said court of appeals, and this action of said court of appeals is assigned as error.

And for these and other errors apparent on the face of the record plaintiff in error, defendant in the circuit court, prays that the judgment of said court of appeals rendered on May 24, 1898, be reversed, and that the judgment of the said circuit court be directed to be reversed, and for costs and general relief.

ARGUMENT.

The primary question on the writ of error is raised by the first four assignments, and concerns the jurisdiction of the court of first instance, which was the circuit court of the United States for the southern district of Florida.

It will not be contended that this court of first instance had jurisdiction by reason of diverse citizenship. It could only have had jurisdiction on the ground that the case was one "arising under the laws of the United States."

A case in law or in equity may be said to arise under the laws of the United States when its correct decision *depends* on a construction by the court of those laws.

Cohens *vs.* Virginia, 6 Wheaton, 264, 379.

The character of a case is determined by the questions involved. These questions must be real questions at issue, upon which a correct decision depends, and not abstract or narrative propositions, stated by a pleader, on which the decision does not depend, and as to which a decision may be reached without considering them. If from the questions really at issue it appears that some title, right, privilege, or immunity, on which the recovery depends, *will* be defeated by a necessary construction of a law of the United States or sustained by an opposite and necessary construction, or if the validity of the law must necessarily be affirmed or denied by the court, the case will be one arising under the laws of the United States within the meaning of that term as used in the judiciary acts, and otherwise not.

The ancient Fictions of English law, by which, for example, the courts of King's Bench and of Exchequer usurped the jurisdiction of the common pleas by averments on the part of plaintiff, in the one case, that the defendant was in custody of the King's marshal, and in the other that the plaintiff was the King's debtor (Maine's Ancient Law, 3d Am. ed., p. 25), were instances of a struggle for judicial power or for a favorite forum, which belong to a time long past and have no place in our federated nationality.

If a plaintiff, in the absence of diverse citizenship, can go into the United States circuit court by merely including in his declaration historical statements with respect to his chain of title to the land he claims, in which an act of Con-

gress is referred to, the well-established boundaries of jurisdiction will be invaded in the desire to make choice of a forum as a matter of personal desire.

Such an attempt was defeated in Muse *vs.* Arlington, &c., Co., 168 U. S., 430, 435, where the allegations by plaintiff as to a treaty of the United States were held not to confer jurisdiction on the circuit court, whose jurisdiction is not presumed, but must clearly appear. The language of this court in that case is noteworthy in its application to the contention at the bar in the instant case:

"Some right, title, privilege or immunity, dependent on the treaty must be so set up and claimed as to REQUIRE the circuit court to pass on the question of *validity or construction* in disposing of the right asserted."

And see the cases there cited by his honor the Chief Justice.

In Pratt *vs.* Paris, etc., Co., 168 U. S., 255, 259, there was controversy as to certain rights under patents of the United States for inventions, which patents resemble in some respects patents under land laws (U. S. *vs.* Am. B. Tel. Co., 128 U. S., 315, 366). The defendants The Paris Company set up in the State court, among other defenses, the invalidity of the patents, and evidence as to the invalidity of the patents as infringements of a prior patent to another person was objected to on the ground that the circuit courts of the United States only could have jurisdiction of such a matter. It was held by your honors that the action did "not arise under the patent-right laws of the United States in any proper sense of the term." We do not say that the case was on all-fours with the one at bar in all respects, but we refer to its underlying principle and to the authorities cited by his honor Mr. Justice BROWN.

The case of Leyson *vs.* Davis, 170 U. S., 36, 39, may also be referred to.

In White *vs.* Leovy, 174 U. S., 91, 96, it was held that

there was no Federal question, although plaintiff set up allegations and contentions, referring to acts of Congress, concerning swamp lands, United States patents of the same, and official plats of a United States surveyor.

In Third Street, &c., Co. *vs.* Lewis, 173 U. S., 457, 460, where the complainant set up a sale by a Federal court, it was held that this fact did not in itself give the circuit court jurisdiction, unless it appeared by the plaintiff's statement to be a "necessary" part of his claim.

In Tennessee *vs.* Bank, 152 U. S., 454, 460, it was reiterated that "a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."

In Hanford *vs.* Davies, 163 U. S., 273, 279, it is said to be settled as to a circuit court that "the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleading, but the averments should be positive." The case seems quite as strong in favor of the jurisdiction as the one at the bar, but jurisdiction was denied by the court.

Now, in the light of these precedents and many others cited in the opinions referred to, we beg to inquire what are the averments of plaintiffs below in their declaration, and what they do not aver. The declaration is found at pages 3–5 of the Transcript. As to matter now in hand, it may be divided into two parts:

First. The narrative statement at page 4 that the plaintiffs below claim title under a patent (which is copied at page 24 of the Transcript and was issued July 29, 1896), and that in sundry proceedings in the Department of the Interior the railroad company, defendant below, opposed their claim for the patent without success, and especially under the granting act of May 17, 1856. This is a mere

history, concerning a contest that had been ended by final decision of the Interior Department. It requires no construction of the law of 1856, nor any decision as to its validity, and could give no jurisdiction to the circuit court. "The incident was closed."

Second. A narrative statement, which is *verbatim*, as follows (pp. 4, 5):

"And plaintiffs allege that after the passage of an act of Congress entitled, 'An act to provide for the disposal of abandoned and useless military reservations,' approved July 5, 1885, they contended for and claimed title to and a patent to the said parcel of land, under and by virtue of the first proviso of the second section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior, and the defendant appeared in both of the said offices by its counsel, and there claimed and contended and at the commencement of this suit claimed and contended, that plaintiffs were not entitled to said parcel of land under the said proviso of the said act of Congress, and at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land, and to be in the possession thereof under and by force of the third proviso of the aforesaid act of Congress, approved May 17, 1856."

This statement seems also to be purely historical, and to refer to incidents that are closed. A jurisdiction in the circuit court cannot be justly inferred by argument from them; but if it can be, by the skill of learned counsel, such an inference, as stated in Hanford *vs.* Davies, 163 U. S., 279, will not do. It must appear affirmatively and positively that a decision as to the validity or construction of those laws is "required." If the paragraph quoted can by expert argument be held to mean that the railroad company may or will set up a claim under those laws, the result is the same; for, in the first place, such an argument will not confer jurisdiction, and, in the second place, "a suggestion of

one party that the other may or will set up a claim under the Constitution or laws of the United States does not make the suit one arising under that Constitution or those laws."

Tennessee *vs.* Bank, 152 U. S., 460.

Let us now see what the plaintiffs below do not aver in their declaration:

(*a.*) They do not declare that they claimed and obtained their patent under one construction of the laws of the United States which are referred to, and that the defendant company sets up and insists on an opposite construction which will deny their right and sustain its own.

(*b.*) They do not aver that they are claiming those laws to be valid and the defendant company claiming them to be invalid.

(*c.*) They do not make any averment which presents in the form demanded by this court any "question" or "issue," or anything "positive," in such way "as to require the circuit court to pass on the question of validity or construction [of these laws] in disposing of the right asserted."

Muse *vs.* Arlington, 168 U. S., 435.

Hanford *vs.* Davies, 153 U. S., 279.

We submit that the circuit court had no jurisdiction.

The circuit court of appeals, in its opinion maintaining the jurisdiction of the circuit court (pp. 180, 181), refers to the fact that the defendant below has resisted the claim of plaintiffs below for mesne profits; but the answer to this is that the plaintiffs below did not formulate any controversy on this point in such way as to make a case arising under the laws of the United States, nor did the defendant below assist to make any such case. The question of mesne profits as an incident of success on the part of the plaintiffs below does not appear as a Federal question. We

submit that it was and is a question of the law of Florida concerning land long ago severed from the national domain.

Whether plaintiffs below could have an executory judgment in ejectment against a railway company as to its right of way and a judgment for mesne profits as ancillary and have it as rendered in this cause is a question under the laws of Florida. It is so discussed in the brief of our associates, pp. 28, 29, 36. It was so discussed in both of the lower courts under the same assignments of error (Transcript, pp. 16–18).

If, as we have sought to show, the plaintiffs below propounded no case arising under the laws of the United States, these contentions of the railway company cannot, as it seems to us, confer a jurisdiction on the circuit court.

As to the other points in the cause, reference is made to the brief filed April 5, 1899.

Respectfully submitted.

WILLIAM WIRT HOWE,
For Plaintiff in Error, Defendant Below.

OCTOBER 24, 1899.